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Supreme Court of Canada

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. THIBAUDEAU RINFRET, C.J.C.
" Hon. PATRICK KERWIN, J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRED ESTEY J.
" " CHARLES HOLLAND LOCKE J.
" " JOHN ROBERT CARTWRIGHT J.
" " GÉRALD FAUTEUX J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Stuart Sinclair Garson K.C.

62650—1½

ERRATA

in Volume I of 1952

Page 32, at line 15, read: "Morrow v. Ogilvie Flour Mills Co."

Page 32, fn. (1) should read: "(1918) 57 Can. S.C.R. 403."

Page 247, fn. (1) should read: "(1833) 6 C. & P. 186."

Page 294, fn. (1) should read: "[1946] A.C. 193."

Page 328, fn. (2) should read: "[1930] A.C. 111 at 118."

Page 346, at line 22, read: "Varette v. Sainsbury."

Page 351, fn. (1) should read: "(1905) 10 O.L.R. 546."

NOTICE

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF THE PREVIOUS VOLUME OF THE SUPREME COURT REPORTS.

Aero Tool Works v. *Bonnie* [1952] 1 S.C.R. 495. Petition for special leave to appeal dismissed, 28th July, 1952.

A. G. for Canada v. *Hallet and Nolan* [1951] S.C.R. 81. Appeals allowed, Nolan to have costs, 20th May, 1952.

A. G. for Ontario and Others v. *Winner, S.M.T. Eastern and Other* [1951] S.C.R. 887. Both petitions for special leave to appeal granted, 24th July, 1952.

A. G. for Saskatchewan v. *C.P.R.* (Not reported.) Petition for special leave to appeal granted, 15th July, 1952.

Dexter Construction v. *Assessors of Parish of Bathurst* [1951] S.C.R. 872. Petition for special leave to appeal dismissed, 5th May, 1952.

Maynard v. *Maynard* [1951] S.C.R. 346. Petition for special leave to appeal dismissed, 19th February, 1952.

Minerals Separation v. *Noranda Mines* [1950] S.C.R. 36. Appeal dismissed, 5th February, 1952.

Puget Sound v. *Rederiaktiebolaget Pulp* [1951] S.C.R. 608. Petition for special leave to appeal dismissed, 5th May, 1952.

Winnipeg, City of v. *C.P.R.* [1952] 1 S.C.R. 424. Petition for special leave to appeal granted, 15th July, 1952.

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In Memoriam

His Majesty George VI:

Died, February 6th, 1952.

GOD SAVE THE QUEEN!

On Wednesday the 6th day of February, 1952, all the members of the Court being present, the Chief Justice made the following observations in open Court:

"In the sad circumstances in which we meet to-day the "Court, following precedent, will adjourn until tomorrow.

"This is not the occasion—our loss is too recent and "our feelings are too deeply moved—for any formal "eulogy of our late beloved Sovereign, or for any attempt "at a formal appreciation of his Kingly virtues or his "private character.

"King George VI will be known as a great constitutional "monarch who, through some of the most anxious and "trying periods experienced in British history, maintained "the dignity of the Crown and the position of his high "office and yet carried out the will of the people.

"He will also be remembered for his courage throughout "the whole of the second world war and particularly during "the Battle of Britain.

"His unequalled sense of duty has been an example and "an inspiration to all his subjects. The fidelity to the very "highest traditions of the English monarchy and the "patient toil in the exact performance of the multifarious "duties and calls of his high office were the admiration of "everyone, particularly during the latter years of his life "when he exhibited the greatest fortitude in carrying on "despite very serious illnesses.

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" Through all the years that he held his noble office the " bonds between Sovereign and subject grew in strength in " sight of all the world, and we saw those bonds grow ever " stronger, year by year, month by month, day by day. " We saw respect rise to veneration; but, above all else, we " saw the regard of his subjects deepen into a personal and " individual affection. In the long history of British king- " ship never before have Sovereign and people been made " so conscious of personal ties, so intimate between them.

And God poured him an exquisite wine,
that was daily renewed to him,

In the clear-welling love of his peoples
that daily accrued to him.

Honour and service we gave him, rejoicingly
fearless;

Faith absolute, trust beyond speech and a
friendship as peerless,

And since he was Master and Servant in all
that we asked him,

We leaned hard on his wisdom in all things,
knowing not how we tasked him.

We accepted his toil as our right—none
spared, none excused him.

When he was bowed by his burden his rest was
refused him.

" In his last radio address on Christmas Day—as indeed " in all his addresses—our late Sovereign spoke feelingly of " the family of the British Commonwealth of Nations, " likening that family to his own, the Royal Family.

" The great bereavement which fills the hearts of the " Royal Family at this time is also a sense of personal " bereavement for all subjects of the British Commonwealth " of Nations, and it is this sense of personal bereavement " which chiefly fills our hearts at this hour.

" To Her Gracious Majesty, Queen Elizabeth II, we " humbly pledge our allegiance.

" En 1939, quand Sa Gracieuse Majesté la Reine posa la " première pierre du Palais de la Cour Suprême du Canada, " Elle accompagna cette fonction officielle de deux " allocutions: l'une dans la langue anglaise et l'autre dans " la langue française. C'est donc suivre un illustre exemple " que d'exprimer aujourd'hui, dans ces deux langues, " l'hommage posthume que la Cour doit rendre à notre " regretté Souverain.

" Tout ce que je viens de dire en anglais je le répète en " français; et il n'est pas nécessaire que j'emploie de nou- " veau, ici, dans cette Cour bilingue, les mots que je viens de " dire dans l'autre langue. Il suffit que j'y ajoute l'expression " de notre admiration émue et sincère pour le monarque dis- " paru et que nous reportons sur notre nouvelle Souveraine " —qui vient à peine de quitter le Canada—l'inaltérable " loyauté que nous proférions pour Sa Majesté George VI. "

Mr. Alfred Bull Q.C., of the British Columbia Bar, said:

" May I say, on behalf of the Bar of my Province, how " thoroughly we would like to associate ourselves with what " your Lordship has said.

" I do not think I need add anything further except to " say, if I may, that as one of Her Majesty's Counsel I " would like to express the allegiance of the Bar to Her " Majesty who has, at such a tender age, been forced to take " on the awful responsibilities and burdens of her high " office; and I would like to wish her, on behalf of the Bar, " a long and happy reign."

Mr. L. Emery Beaulieu, Q.C., of the Quebec Bar, said:

" QU'IL PLAISE A LA COUR:

" Qu'il me soit permis, en ma qualité de Doyen des " membres présents du Barreau de Québec, d'exprimer les " sentiments de deuil et de tristesse profonde qui remplissent " aujourd'hui le cœur de tous les citoyens de ma province " comme du pays tout entier.

" La nouvelle foudroyante de la mort de notre monarque " bien-aimé, nous a tous consternés; d'autant plus que les " nouvelles récentes paraissaient particulièrement rassu- " rantes.

" Je puis assurer qu'il n'a existé nulle part plus d'attache- " ment à la personne du Roi dont nous pleurons la perte; " plus d'admiration pour ses nobles qualités, et notamment, " pour sa fidélité dans l'accomplissement des devoirs que " lui imposait la haute fonction qu'il occupait ni plus de " loyauté, que dans la province de Québec,—monarchique " par tradition et par tempérament.

" Nous nous rappelons aujourd'hui, avec émotion, la visite " de Leurs Majestés en 1939; nous nous rappelons la noblesse " et la grâce manifestées par Leurs Majestés dans tous " leurs actes, ainsi que l'enthousiasme que cette visite a " soulevé dans toutes les classes de la société, et je dirais, " particulièrement, parmi les petits et les humbles. Tous " ces souvenirs sont maintenant recouverts d'un voile de " deuil.

" A Sa Majesté la Reine, nous offrons nos très respec- " tueuses sympathies; à celle qui recueille le sceptre de la " couronne, nous offrons, avec nos sympathies très " respectueuses, l'expression de notre loyauté et de notre " dévouement inaltérables. "

Mr. Roger Thibodeau, also of the Quebec Bar, said:

" Avec la permission de cette Honorable Cour, je désire " au nom du Jeune Barreau de Montréal et de Québec " m'associer à mes deux confrères pour exprimer la peine " profonde que nous ressentons tous à la suite de la " nouvelle de la mort du Roi dont toute la vie a été marquée " de dignité, de fidélité au devoir, de grande affection " et de justice à l'endroit de tous ses sujects. Nous sommes " tous frappés par cette mort si soudaine et nous ne pouvons " qu'exprimer notre profonde sympathie et notre loyauté " complète à la Couronne britannique. "

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

99085—1

FITZROY ASHLEY WELSTEAD *(Plaintiff)* ..... } APPELLANT;

AND

CHARLES BROWN *(Defendant)* ..... RESPONDENT.

1951

*May 31
*June 1
*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Legitimacy, common law presumption of—Access by husband and also adultery established—Effect of blood group tests—Presumption rebuttable in Ontario, The Evidence Act, R.S.O. 1937, c. 119, s. 5a (R.S.O. 1950, c. 119, s. 6)—Admissibility of: (a) wife's declaration to husband of adultery and as to paternity; (b) as to resemblance of child—Effect of trial judge's failure to advise wife of protection afforded her by the Evidence Act, s. 7.

In an action for criminal conversation and alienation of affections, evidence was adduced that following the birth of a child to her the appellant's wife confessed to him to having committed adultery with the respondent who she declared to be the father. It was also established that during the time in which the child must have been conceived, the appellant and his wife had had sexual intercourse but that contraceptives were used, and further that the child's birth was registered pursuant to *The Vital Statistics Act,* R.S.O. 1937, c. 88. Two qualified medical practitioners, whose evidence was uncontradicted, testified to having had tests made of the blood of the appellant, of his wife and of the child, and that the tests indicated that if the child was born of the wife, which was admitted, it was not merely improbable but impossible that the appellant was its father.

Held: (1) that there was ample evidence to support the jury's finding of adultery.

(2) that on the evidence the case should be treated as one in which it was established that the appellant had had sexual intercourse with his wife during the period within which the child must in the course of nature have been conceived, and if the matter ended there it would have followed that the child must be held to be legitimate, but that the uncontradicted evidence of two qualified medical practitioners to the effect that tests carried out with samples of blood of the appellant, of his wife and of the child, indicated that if the child was born of the wife, as was admitted, then it was not merely improbable but impossible that the appellant was the father: rebuts the presumption of legitimacy. *R.* v. *Luffe* 8 East 193; *Preston-Jones* v. *Preston-Jones* [1951] 1 All. E.R. 124.

(3) that under the circumstances of the case the failure of the trial judge to deal with the presumption of legitimacy could not have occasioned any substantial wrong or miscarriage of justice.

*PRESENT: Kerwin, Taschereau, Kellock, Locke and Cartwright JJ.

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(4) that the presumption of legitimacy referred to in *The Vital Statistics Act,* 1948 (Ont.) c. 97, is a rebuttable presumption of law in Ontario since the enactment of s. 5*a* of *The Evidence Act,* R.S.O. 1937, c. 119 (now s. 6 of R.S.O. 1950, c. 119).

(5) that since the sufficiency of proof that the samples of blood tested came respectively from the appellant, his wife, and the child, was not called in question at the trial, it must be taken as being established. *Earnshaw* v. *Dominion of Canada Insurance Co.* [1943] O.R. 385 at 395-96.

(6) that evidence of certain conversations between the appellant and his wife in the absence of the respondent (in which the wife confessed to adultery with the respondent and declared him father of the child) was properly admitted: (i) on the principle the letters of the Countess of Aylesford were admitted in the *Aylesford Peerage Case* 11 App. Cas. 1; (ii) to show consistency. Phipson on Evidence 8 Ed. 480; *R.* v. *Coyle* 7 Cox 74 at 75; *Flanagan* v. *Fahy* [1918] 2 Ir. R. 361 at 381.

Per: Kerwin J.: A charge of conspiracy having been made by the respondent in his pleadings, evidence was admissible upon this branch of the case, if for no other reason.

(7) that evidence that the child resembled the defendant (respondent) was admissible. *Doe Marr* v. *Marr* 3 U.C.C.P. 36.

(8) that the failure of the trial judge to advise the wife of the appellant of the protection afforded her by the proviso in s. 7 of *The Evidence Act* was, since it was obvious that the wife had decided to give evidence as to her adultery, unimportant. *Elliot* v. *Elliot* [1933] O.R. 206 at 212 approved. *Allen* v. *Allen and Bell* [1894] p. 248 at 255, *Laffin* v. *Laffin* [1945] 3 D.L.R. 595 and *Waugh* v. *Waugh* [1946] 2 D.L.R. 133, distinguished.

Appeal allowed and judgment at trial restored.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing an appeal by the defendant from the judgment of Gale J. after a trial with a jury.

J. J. Robinette K.C. and *Benjamin Laker* for the appellant. Evidence of conversations between the plaintiff and his wife in which she is said to have admitted her misconduct with the defendant and declared him the father of the child, was admissible evidence: (i) on the ground that it was *res gestae.* (ii) If the evidence was inadmissible, there was no substantial wrong or miscarriage of justice by reason of the fact that the plaintiff's wife was called and gave evidence of the same matter which the plaintiff gave in his evidence. (iii) Counsel for the defendant did not

(1) [1950] O.W.N. 643.

object to such evidence, but cross-examined both the appellant and his wife thereon, and thereby waived the rule excluding the said evidence.

The Court of Appeal erred in penalizing the plaintiff in costs of the trial and of the Appeal, for a reason which had no foundation in fact, i.e. that the trial was abortive due to the persistence of counsel for plaintiff in offering testimony which was inadmissible as evidence; no objection thereto was offered by counsel for the defence, nor by the trial judge, nor was there persistence by the plaintiff thereon.

The Court of Appeal erred in holding that no evidence was produced to prove the identity of the plaintiff, his wife or the child as being the persons whose blood was tested, and that they were in fact the plaintiff, his wife and the child. (*a*) There was sufficient identification by the evidence of Dr. Fremes. (*b*) Exhibit 8 sufficiently identified the plaintiff, his wife, and the infant Susan Welstead, as the persons whose blood was tested. (*c*) In the absence of any evidence to the contrary or any suggestion that the said persons were not the plaintiff, his wife and the infant Susan Welstead, the plaintiff made a *prima facie* case of identity. (*d*) There was sufficient identification of the persons having in mind that the action is a civil one and not a criminal case.

The Court of Appeal erred in setting aside the trial judgment on the basis that the trial judge failed to tell the jury that the fact that the birth of the child was registered raised a presumpion of legitimacy under s. 6(3) of *The Vital Statistics Act,* R.S.O. 1937, c. 88.

(*a*) That Act was repealed by *The Vital Statistics Act,* 1948, c. 97. The latter Act was in force at the date of the issue of the writ and at the date of trial. The learned justice in Appeal proceeded on the basis the 1937 Act was still in force. The birth certificate was put as corroborative evidence of the place and date of birth only.

(*b*) The gist of the action of criminal conversation being damages for adultery, the jury was entitled to find that adultery had taken place irrespective of the question as to illegitimacy.

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(c) There was direct evidence of adultery, and further evidence of opportunity and of familiarity sufficient to conclude that the appellant's wife and the defendant had engaged in sexual intercourse. The jury so found, as they were entitled to, irrespective as to whether a child was or was not born as a result thereof.

The Court of Appeal erred in setting aside the trial judgment on the ground that the trial judge erred in failing to direct the jury that in considering the legitimacy or illegitimacy of the child as evidence of adultery there is a strong presumption of law in favour of legitimacy.

(a) The presumption as to illegitimacy is a rebuttable one, and there was medical evidence, re the blood tests, which a jury acting reasonably, could have found rebutted the presumption.

(b) Apart from the presumption of legitimacy there was a finding by the jury of adultery based upon a preponderance of credible evidence.

(c) The jury was entitled to find that adultery had been committed whether the child in question was legitimate or not and counsel for the defendant did not ask that a question as to legitimacy be put to the jury.

(d) There was no substantial wrong or miscarriage of justice by reason of the fact that the trial judge did not tell the jury of the presumption as to legitimacy and counsel for the defendant did not ask the trial judge to tell the jury of the common law presumption of legitimacy.

C. L. Dubbin K.C. for the respondent. The Court of Appeal for Ontario were right in holding that the trial was unsatisfactory and that the verdict could not stand and must be set aside. The trial judge erred in failing to direct the jury that in considering the legitimacy of the child, Susan, on the issue of adultery, that there was a presumption in favour of legitimacy. He left the question of legitimacy or illegitimacy as if no presumption existed and erred in failing to direct the jury that the child is conclusively proven legitimate where the evidence disclosed that the husband and wife co-habited together, and

where no impotency is proved. *Russell* v. *Russell* (1); *Gordon* v. *Gordon* (2); *Brown* v. *Argue* (3).

The trial judge erred in failing to direct the jury that the fact that the child born to Mrs. Welstead, was registered in the name of the plaintiff, was *prima facie* evidence of legitimacy, and misdirected the jury on that issue when that very question was asked of him by a juror. *Smith* v. *Smith* (4); *Crone* v. *Crone* (5); R.S.O. 1950, c. 412, s. 41.

The learned trial judge erred in failing to direct the jury on the issue of legitimacy or illegitimacy that the presumption of legitimacy could only be overcome by producing in the minds of the tribunal of fact a moral certainty. *Clark* v. *The King* (6); *Morris* v. *Davies* (7). Non-access not having been shown, but in fact the contrary having been proved, the other evidence which was submitted which tended to bastardize the child was inadmissible. It is contrary to public policy to admit such evidence save and except where non-access is first established. Wigmore on Evidence 3rd Ed. Vol. 1 s. 134.

Parents are not permitted in order to bastardize a child, from which adultery can be inferred, to give evidence that although they carried on normal marital relations they practiced birth control devices. Here both so testified. They cannot give evidence tending to bastardize a child born in lawful wedlock from which adultery could be inferred, even though the judgment sought for did not result in a declaration of illegitimacy. It may be that a wife's admission as to adultery is admissible and even perhaps she may be permitted to say that she is pregnant by a man other than her husband, so long as her evidence stops there, since that is merely evidence of misconduct, but does not tend to bastardize the child. *Warren* v. *Warren* (8). The spouses cannot go further and try to prove the child illegitimate by suggesting that birth control methods used by them made conception impossible. It is contrary to public policy to permit a jury to be the forum to determine the effectiveness of birth control devices. *Russell* v. *Russell, supra* at 700,726; *Goodright* v. *Moss* (9). Since the amendment to the *Evidence Act* (1946

(1) [1924] A.C. 687 at 705-708.
(2) [1903] P. 1 at 141, 142, 143.
(3) 57 O.L.R. 297 at 299.
(4) [1942] O.W.N. 282.
(5) [1946] O.R. 573, 576.
(6) 61 Can. S.C.R. 608, 617.
(7) 5 Cl. & F. 165.
(8) [1925] P. 107.
(9) (1777) 2 Cowp. 591.

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Ont. c. 25, s. 1) certain hardships that the rule in *Russell* v. *Russell* imposed with respect to the evidence of non-access have been removed and spouses pursuant to the amendment can now give evidence of non-access but apart from that exception the common law provision against a married person giving evidence tending to bastardize a child remains unimpaired. *Crone* v. *Crone supra* at 574. The evidence of the plaintiff as to what his wife told him was inadmissible and could not under any circumstances be evidence against the defendant.

Neither the plaintiff nor his wife gave any evidence as to a blood test or that they took the baby in question to Dr. Fremes. The doctor was called and told of examining a Mr. and Mrs. Welstead and a baby, Susan, but he did not identify either of them, who were in the court room at the time, as the persons who had been to see him and, even more significant, there was no evidence tendered that the baby he examined was the baby in question. There was no suggestion in the evidence that he knew the Welsteads prior to the time of the visit. His evidence was inadmissible; there being an essential gap in the required proof. The effect of his evidence was merely to give an opinion that the child in question was illegitimate and was inadmissible by reason of it being contrary to the policy of law to embark on such an investigation unless non-access is first proved; furthermore, the only effect of his evidence being to bastardize the child and not to advance the adultery, it was irrevelant and inadmissible.

The trial judge erred in permitting Mrs. Welstead to be examined by counsel for the plaintiff without first advising her of the protection afforded by the *Evidence Act* and it is not at all clear from the evidence that if she had been so advised, that she would have testified. The *Evidence Act* R.S.O. 1937, c. 119, s. 8: *Laffin* v. *Laffin* (1); *Waugh* v. *Waugh* (2); *Elliot* v. *Elliot* (3). The trial judge erred in directing the jury as to the onus of proof to establish adultery. He ought to have directed the jury that before they could find adultery they must be satisfied beyond a reasonable doubt that the defendant committed

(1) [1945] 3 D.L.R. 595. (2) [1947] 2 D.L.R. 133.
(3) [1933] O.R. 266.

adultery with the wife of the plaintiff. *Ginesi* v. *Ginesi* (1); *DeVoin* v. *DeVoin* (2); *Campbell* v. *Campbell* (3); *George* v. *George* (4).

The Court of Appeal were right in setting aside the verdict on the ground that the trial was not satisfactory, and having rightfully come to that conclusion had a judicial discretion to direct a new trial on such terms as they saw fit and proper and no appeal lies to the Supreme Court of Canada from the exercise of such discretion. *The Supreme Court Act* 1927 R.S.C. c. 35, s. 44 as amended.

The plaintiff having resumed co-habitation with Mrs. Welstead at the time of the issue of the writ, did not suffer any damages and even if the Court of Appeal erred in setting aside the judgment herein, this appeal should be dismissed.

KERWIN J.:—This is an action for damages for criminal conversation tried before Gale J. and a jury. Three questions were submitted to the jury which, together with the answers, are as follows:—

1. Was adultery committed between the defendant Charles Brown and the plaintiff's wife, Lucy Irene Welstead?

A. Yes.

2. If your answer to question 1 is "yes", where and when was such adultery committed?

A. On the Base Line Road between Whitby and Pickering Beach on or about February 17th, 18th or 19th, 1948.

3. If your answer to question 1 is "yes", at what amount do you assess the damages of the plaintiff Fitzroy Ashley Welstead?

A. $4,000.

On these answers judgment was entered for the plaintiff for $4,000 and costs. On appeal to the Court of Appeal for Ontario that judgment was set aside but a new trial was permitted the plaintiff on condition that within a fixed time he pay the costs of the abortive trial and of the appeal. As this was not done, the Court ordered that the appeal be allowed and the action dismissed, with costs. It is from that judgment that the present appeal is taken.

(1) [1948] P. 179; 1 All E.R. 373.
(2) [1946] 2 W.W.R. 304.
(3) [1950] O.R. 297.
(4) [1950] O.R. 787.

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Kerwin J.

The adultery testified to by the appellant's wife was denied by the defendant respondent. A child was born to the wife on November 28, 1948. This birth was registered on December 21, 1948, at which time the *Vital Statistics Act* of the Province of Ontario was R.S.O. 1937, c. 38, and by s. 24 thereof it was provided that no child born in wedlock should be registered as illegitimate. The action was commenced in 1949 and the trial commenced February 21, 1950, and in the meantime the 1948 *Vital Statistics Act*, c. 97, had been proclaimed to be in force as of January 1, 1949. By s. 38 thereof a birth certificate shall contain only the name of the child, date and place of birth, sex, date of registration, and registration number. The following certificate was issued pursuant to s. 39 and was filed as an exhibit at the trial:—

PROVINCE OF ONTARIO
THE VITAL STATISTICS ACT, 1948.

Name: Welstead, Susan Margaret.
Date of Birth: Nov. 28, 1948. Sex F.
Place of Birth: Pickering Twp. Ontario.
Registration: Dec. 21, 1948. 48-05-098516
Issued at Toronto, Ontario.
The 22 Day of Feb. 1950.

G. W. DUNBAR
Registrar-General.

Subsections 1 and 4 of s. 41 provide:—

41(1). A certificate purporting to be issued pursuant to section 39 and signed by the Registrar-General shall be admissible in any court in Ontario as *prima facie* evidence of the facts certified to be recorded, and it shall not be necessary to prove the signature or official position of the person by whom the certificate purports to be signed.

(4). Notwithstanding subsections 1 and 3, no birth certificate and no certified copy of a registration of birth or still-birth shall be admissible in evidence to affect a presumption of legitimacy.

The presumption of legitimacy referred to in subsection 4 of s. 41 is a rebuttable presumption of law that a child born during lawful wedlock is legitimate and that access occurred between the parents. Under the decision of the House of Lords in *Russell* v. *Russell* (1), the evidence of the parents would not have been admissible to prove their access or non-access during marriage with the object or possible result of bastardizing a child born during wedlock

(1) [1924] A.C. 687.

but in 1946 the Ontario legislature intervened to alter this rule by enacting s. 5*a* of *The Evidence Act*, R.S.O. 1937, c. 119, in the following terms:—

> 5*a*. Without limiting the generality of section 5, a husband or a wife may in any action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage.

Both the appellant and his wife testified that at the time the child Susan could have been conceived they did not have sexual intercourse except with the use of contraceptives. Under s. 5*a*. of *The Evidence Act* (now s. 6 of R.S.O. 1950, c. 119) this evidence is admissible, its effect being, of course, an entirely different matter. However, it also appears in evidence that samples of the blood of the child and of the appellant were taken and that in the opinion of the medical men called on behalf of the appellant, and whose evidence was not contradicted, the appellant could not have been the father of the child. This evidence is also admissible: *Wigmore on Evidence*, 3rd edition, vol. 1, para. 165a.

This is not an action for divorce so that we are not faced with the problem whether the word "satisfy" in sections 29 and 30 of the *British Matrimonial Causes Act*, 1857, or in section 178 of the *British Supreme Court of Judicature (Consolidation) Act*, 1925, as amended by section 4 of the *Matrimonial Causes Act*, 1937, connotes something less than proof beyond reasonable doubt: *George* v. *George* (1); *Preston-Jones* v. *Preston-Jones* (2). The present is a civil action as is an action for dissolution of marriage: *Mordaunt* v. *Moncrieffe* (3). However, in proceedings to establish legitimacy Lord Lyndhurst in *Morris* v. *Davies* (4) stated as follows:—

> The law was laid down by the learned Judges in the *Banbury Peerage* case in these terms: "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time, when, by such intercourse the husband could, according to the law of nature, be the father of such child."

(1) [1950] O.R. 787.
(2) [1951] 1 All E.R. 124.
(3) (1874) L.R. 2 Sc. & Div. 374.
(4) (1837) I Cl. & F. 163 at 215.

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and, again, when sitting in the House of Lords, at page 265:—

> It (the presumption of legitimacy) is not to be broken in upon, or shaken, by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

The same rule applies where "the result of a finding of adultery in a case such as this is in effect to bastardize the child. That is a matter in which from time out of mind strict proof has been required" per Lord Simonds in *Preston-Jones* v. *Preston-Jones*. In the same case Lord MacDermott states: "The evidence must no doubt be fair and satisfy beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden* v. *Loveden* (1), as "the guarded discretion of a reasonable and just man."

In *Baxter* v. *Baxter* (2), the House of Lords had to construe s. 7(1) (*a*) of the *Matrimonial Causes Act,* 1937:

> In addition to any other grounds on which a marriage is by law void or voidable, a marriage shall be voidable on the ground (*a*) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage; * * *

It was held that a marriage may be consummated within that section although artificial methods of contraception are used. To say, however, that the parties to a marriage could not testify that they did not have sexual intercourse except with the use of contraceptives is another matter. If neither the appellant nor his wife testified as they did, the evidence of the doctors would have been admissible; although the spouses did testify, the doctors' evidence is still evidence, and the effect of their evidence was for the jury to determine.

The trial judge said to the jury that the appellant must show by a preponderance of credible evidence the adultery charged, that it should be "strictly proved", that "you should exercise a cautious discretion", that "you should proceed with caution before you decide that adultery had been established. So that to that extent there is a rather heavy duty cast upon the plaintiff to establish his case."

The jury should have been charged in accordance with the authorities cited as to the presumption of legitimacy

(1) (1810) 2 Hag. Con. 1 at p. 3. (2) [1948] A.C. 274.

and as to the kind of evidence there must be in order to overcome that presumption. However, s. 28(1) of *The Judicature Act*, R.S.O. 1950, c. 190, provides:—

> A new trial shall not be granted on the ground of misdirection * * * unless some substantial wrong or miscarriage has been thereby occasioned.

In view of the uncontradicted evidence of the doctors, I am unable to say that any miscarriage of justice has occurred, and unless the respondent is able to justify the other reasons of the Court of Appeal for setting aside the verdict, the order complained of cannot stand.

That Court determined that there was no evidence to prove the identities of the appellant and the child as being the persons whose blood was tested. However, upon a reading of the record, I am satisfied that there was such evidence and that in fact the trial proceeded upon the basis that there was no question about such matters. The Court of Appeal also considered that the evidence of conversations between the appellant and his wife, in which she is said to have admitted her misconduct with the respondent was inadmissible but a charge of conspiracy was made by the respondent in his pleadings, and such evidence was admissible upon that branch of the case if for no other reason. Henderson J.A. stated that there were a number of other instances of inadmissible evidence but only two were mentioned before us. One was as to what was said to have been the likeness of the child to the respondent. This evidence was admissible: Wigmore, 3rd Ed. para. 166; *Doe Marr* v. *Marr* (1). The other was that the trial judge should have advised the wife of the appellant of the protection afforded her by s. 7 of the Ontario Evidence Act. On this point I agree with what my brother Cartwright has said.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment at the trial restored.

The judgment of Taschereau, Locke and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—In this case the appellant claimed damages for criminal conversation. At the trial before Gale J. the jury found that the respondent had committed adultery with the wife of the appellant on or about the

(1) (1853) 3 U.C.C.P. 36 at 51.

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17th, 18th or 19th of February, 1948, and assessed the damages at $4,000. Judgment was entered accordingly but was set aside by the Court of Appeal, a new trial being directed on terms. The appellant asks that the judgment at trial be restored.

On the 28th of November, 1948, the appellant's wife gave birth to a daughter. The appellant pleaded that the respondent was the father of such daughter. No question as to this was put to the jury, but it would seem probable from the amount of the verdict that the jury were of the view that this fact was proved.

It may be stated at once that there was ample admissible evidence to support the finding of adultery. The appellant's wife testified to the commission of an act of adultery between herself and the respondent. There was evidence of other witnesses as to familiarities between them and as to opportunity. The defence was a complete denial of this charge. In addition it was alleged in the statement of defence that the appellant and his wife had "schemed, connived, planned and conspired to concoct circumstances to give rise to this fictitious action" for the purpose of enabling them to become possessed of a property which the appellant had purchased under agreement from the respondent.

The following four grounds for setting aside the judgment at the trial are mentioned in the reasons of the Court of Appeal delivered by Henderson J.A.:—

(i) Failure to charge the jury that there is a strong presumption of the legitimacy of a child born of a married woman.

(ii) Failure to charge the jury that the registration of the child's birth raised a presumption of her legitimacy.

(iii) Lack of evidence that three samples of blood submitted to certain tests came respectively from the plaintiff, his wife and the child.

(iv) The wrongful admission of evidence of certain conversations between the appellant and his wife in the absence of the respondent in which the wife confessed adultery with the respondent and stated that he was the father of the child.

The learned justice of appeal added that there were a number of other instances of the admission of inadmissible evidence but did not specify what these were.

Before us counsel for the respondent sought to support the judgment of the Court of Appeal on the following grounds in addition to the four mentioned above.

(v) That, it having been admitted that sexual intercourse between the appellant and his wife had taken place during the period within which the child must, in the course of nature, have been conceived, no evidence should have been received tending to bastardize the child and particularly the evidence of the doctors as to certain blood tests should have been rejected.

(vi) Falure to charge the jury correctly as to the degree of proof required to establish adultery.

(vii) Failure of the learned trial judge to advise the wife of the appellant of the protection afforded her by section 7 of the Ontario Evidence Act.

(viii) Wrongful admission of evidence that the child resembled the respondent.

As to the first ground, above set out, the learned trial judge did not in his charge make any reference to the presumption of legitimacy. Counsel for the respondent directed attention to this in the course of his objections to the charge which occupy several pages of the transcript but the learned trial judge declined to recall the jury. There is no doubt that the presumption exists. The following statements in Halsbury (2nd Edition) Vol. 2, sections 766 and 768 are fully supported by the authorities there cited:

766. Every child born of a married woman during the subsistence of the marriage is *prima facie* legitimate, and the presumption of legitimacy arises also where the child is born not more than nine months after the dissolution of the marriage by death or otherwise. But in every case the husband and wife must have had opportunity of access to each other during the period in which the child could be begotten and born in the course of nature, and they must not be proved to be impotent. The presumption, however, is not a presumption *juris et de jure,* which cannot be rebutted, but a presumption only, which may be rebutted by evidence of circumstances proving the contrary, and such evidence must not be slight in its nature, but strong and satisfactory.

768. The presumption of legitimacy continues notwithstanding that the wife is shown to have committed adultery with any number of men. The law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved, before the child can be bastardized, that the husband did not have sexual intercourse with his wife at the time when it was conceived.

In the case at bar both the appellant and his wife testified that they had had sexual intercourse from time to time during the period within which the child must have been conceived but had used artificial means designed to prevent conception, such means being used sometimes by

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the husband, sometimes by the wife and sometimes by both. No medical evidence was tendered to indicate how effective such precautions were likely to be but it would appear that the appellant did not himself regard them as being certain to accomplish their purpose for he testified that he was "stunned" when his wife first told him that the child was not his. In my view on the evidence in this record the case should be treated as one in which it is established that the appellant had sexual intercourse with his wife during the period within which the child must in the course of nature have been conceived, and if the matter ended here it would have followed that the child must be held legitimate. In this case, however, the evidence of two qualified medical practitioners was to the effect that tests carried out with samples of the blood of the appellant, of his wife, and of the child indicated that if the child were born of the wife, as is admitted, then it was not merely improbable but impossible that the appellant was the father. It is not necessary to go at length into the details of the evidence. The salient feature was that the blood of the child contained a certain factor, that it was a scientific certainty that such factor must have been present in the blood of at least one of her parents, that it was not present in the blood of her mother, that it must therefore have been present in the blood of her father, that it was not present in the blood of the appellant and therefore he could not be the father. This medical evidence was not contradicted nor was it shaken or weakened in cross-examination. The doctors testified that the test described is a comparatively recent development in the science of genetics and counsel did not refer us to any case in the courts of this country or of England in which the admissibility or effect of such evidence has been considered. It appears to me to be admissible and, if accepted, to be effective to bastardize the child. No case suggests that the presumption of legitimacy will not yield to proof that it was impossible, in the course of nature, that the husband could be the father of the child. I do not think that any case prescribes a higher degree of proof in order to rebut the presumption than that required in *R.* v. *Luffe* (1). In that case it was proved that the husband had no access to his wife from the 9th April, 1804, until two

(1) (1807) 8 East 193.

weeks before the birth of her child on 13th July, 1806. The Court,—Lord Ellenborough and Grose, Lawrence and Le Blanc, JJ. were unanimous in upholding the decision that the child was illegitimate. At page 207 Lord Ellenborough said:—

* * * And therefore, if we may resort at all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to shew the absolute physical impossibility of the husband's being the father: I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed.

and further at the same page:—

* * * the general presumption will prevail, except a case of plain natural impossibility is shewn.

At pages 209 and 210 Lawrence J. said:—

Now without going over the whole ground of the argument again, the doctrine of the *quatuor maria* has been long exploded; and it has been shewn by the authorities mentioned by my lord, that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility?

and at page 212 Le Blanc J. said:—

But where it can be demonstrated to be absolutely impossible, in the course of nature that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate. If it does not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

It may be that the phrase "demonstrated to be absolutely impossible" requires some modification in view of the judgments recently delivered in the House of Lords in *Preston-Jones* v. *Preston-Jones* (1), but even if it were accepted without modification the evidence of the doctors in this case would appear to fall within it. The question put by Lawrence J. in *R.* v. *Luffe* (*supra*) "Then why not give effect to any other matter which proves the same natural impossibility?" appears to me when applied to this evidence to be unanswerable. I wish to make it plain that what I regard as being decisive is the fact that the evidence was to the effect that the appellant could not be

(1) [1951] 1 All E.R. 124.

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the father of the child. Had the doctors testified that the result of the tests indicated that it was in the highest degree improbable, but not impossible, that the appellant be the father of the child it would, in my opinion, have been the duty of the trial judge to direct the jury that as a matter of law such evidence could not avail against the presumption. Had the learned trial judge charged the jury as to the presumption of legitimacy, as, with respect, I think he should, it would have been necessary for him to instruct the jury that if they accepted the evidence of the doctors it effectively rebutted the presumption. I can find no ground on which acting reasonably, the jury could have rejected this evidence. The witnesses were possessed of high professional qualifications and their testimony was neither contradicted by other evidence nor weakened on cross-examination. Under these circumstances, I am of opinion that the failure of the learned trial judge to deal with the presumption can not have occasioned any substantial wrong or miscarriage of justice. For these reasons I think that the grounds of attack upon the trial judgment numbered (i) and (v) above can not be sustained.

For the reasons given by my brothers Kerwin and Kellock I agree that the argument that the learned trial judge should have told the jury that the fact of the registration of the child's birth gave rise to a presumption of legitimacy can not succeed.

As to ground (iii), mentioned above, I am of opinion that the evidence of Dr. Fremes was sufficient to establish that the samples of blood tested came respectively from the appellant, his wife and the child. Certainly the sufficiency of their identification was not called in question at the trial. The following passage from the judgment of Robertson C.J.O. in *Earnshaw* v. *Dominion of Canada Insurance Company* (1) appears to me to be applicable:—

> In these circumstances, if counsel for appellant desired to contend that the evidence of identification was defective or insufficient because the means or method of identification was not stated, or because there was none, in my opinion the time to raise that question was when these witnesses were giving their evidence. No objection was taken that evidence of the result of the test was inadmissible because the witnesses did not state how they identified the sample, and I do not think that objection can be taken now.

(1) [1943] O.R. 385 at 395-6.

The evidence which the Court of Appeal regarded as inadmissible to which reference is made in ground (iv) above, was that of statements made to the appellant by his wife the effect of which may be briefly summarized as follows. On the morning after the wife's return from the nursing home some ten days after the birth of the child she was feeling upset and unhappy. The appellant was treating her with kindness and consideration and endeavouring to encourage and console her. He was either about to get her some tea or had just done so. Up to this time any thought that the child was not his was completely absent from his mind. In these circumstances the wife "blurted out" that she did not deserve his sympathy or kindness, that she had been unfaithful to him and that the child was not his but the respondent's. An account of this conversation was given in chief by both the appellant and his wife. No objection was taken by counsel for the respondent. In cross-examination of each of these witnesses counsel for the respondent went fully into the details of the conversation and it became apparent that he had explored the subject matter fully on his examination for discovery of the appellant. I think it may properly be inferred that even if counsel for the appellant had not dealt with the conversation in chief, it was the intention of counsel for the respondent to do so in cross-examination. Under that circumstance and in view of the fact that there was ample other admissible evidence to fully support the verdict I do not think that it could be held that any substantial wrong or miscarriage had resulted from the admission of this evidence in chief. I am, however, of opinion that the evidence was admissible on two grounds, although not, of course, as evidence of the truth of the matter stated. I think the evidence of the wife's statement was admissible on the principle on which the letters of the Countess of Aylesford stating that an adulterer was the father of her child were admitted in *The Aylesford Peerage* (1). At page 10 of the report of that judgment the Earl of Selborne said:—

> These declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements at such a time. Your Lordships will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing

(1) (1885) 11 App. Cas. 1.

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which, on the principles which were certainly acted upon in *Morris* v. *Davies* (1) (and which appear to me to be sound principles, and quite consistent with the rule), ought not to be excluded from consideration.

In the case at bar the fact that the wife made such a statement to her husband at such a time and under such circumstances was, I think, a relevant item of circumstantial evidence falling within the reasoning of the passage just quoted.

The second ground on which I consider the evidence was admissible is that stated in *Phipson on Evidence* (8th Edition) at page 480, where after stating the rule that evidence that a witness had made a previous statement similar to his testimony in court is now generally inadmissible to confirm his testimony the learned author lists certain exceptions, the first being:—

> Such statements are, however, receivable in the cases mentioned below, not to prove the *truth* of the facts asserted, but merely to show that the witness is consistent with himself: (1) where the witness is charged with having *recently fabricated* the story, e.g., from some motive of interest or friendship, it may be shown both by the witness himself and the person to whom it was addressed, that he had made a similar statement before such motive existed.

In my opinion this extract is supported by the authorities cited and is a correct statement of the law. In *R.* v. *Coyle* (2), Erle J. said:—

> The point is to prevent the observation that the witness has now invented the story.

In *Flanagan* v. *Fahy* (3) at pages 381 and 382, Sir Ignatius O'Brien expressly approved the statement from *Phipson on Evidence,* quoted above, which had appeared *ipsissimis verbis* in an earlier edition. In the case at bar the respondent pleaded that the charge of adultery made against him was a fiction concocted in pursuance of a conspiracy to obtain damages from him. He led evidence in an endeavour to support this allegation. This plea was apparently pressed by counsel for the respondent in addressing the jury for the learned trial judge deals with it at some length in his charge and refers to it as having been "alleged most strongly". It would have been proper for the learned trial judge to point out to the jury that the statements made by the wife to the appellant were not

(1) 5 Cl. & F. 163. (2) 7 Cox C.C. 74 at 75.
(3) [1918] 2 Ir. R. 361.

in themselves direct evidence of the truth of the facts stated, but he was not asked to do so, and the omission appears to me to be of little importance in the circumstances of this particular case, the wife having given evidence at the trial and having testified as to the truth of all the facts which she had related in the conversation in question. I cannot think that the omission referred to could have caused any substantial wrong or miscarriage.

The next ground of attack upon the trial judgment, numbered (vi) above, is that the learned trial judge should have charged the jury that before they could find that the respondent had committed adultery with the appellant's wife they must be satisfied of that fact not on a mere preponderance of evidence but beyond a reasonable doubt. This point was taken in the notice of appeal and was fully argued before us but the Court of Appeal did not find it necessary to deal with it. We were assisted by an able argument on the question as to the degree of proof of adultery required in Ontario in an action for divorce and the question whether the same degree of proof is required in an action such as this for damages for criminal conversation in which proof of adultery is an essential part of the cause of action but neither the status of the defendant nor the legitimacy of a child are directly affected by the judgment in the sense that either would be *res judicata* if, for example, the wife of the defendant were to bring action against him for divorce or the child should claim to inherit on the death intestate of the appellant. I do not find it necessary to decide these questions.

In the case at bar if the jury accepted the medical evidence, as in my opinion they must have done, the facts that the appellant's wife had committed adultery with someone and that the child was illegitimate were proved, beyond all reasonable doubt. The learned trial judge made it plain to the jury that the medical evidence in no way implicated the respondent. He explained to them that to succeed the plaintiff must prove that the respondent had committed adultery with his wife. As to the degree of proof required he put the matter as follows:—

* * * Now, summing up what I have just said to you, and having regard to the evidence that has been given here, the two issues to be determined by you gentlemen, as I understand it, are these: first, has the plaintiff established by a preponderance of credible evidence that Charlie Brown

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committed adultery with the plaintiff's wife and, secondly, if so, has Welstead sustained a loss or damage or injury as a result of the commission of that adultery. That is why, gentlemen, the questions are framed in the manner in which they are, and which I read to you. The third issue is, what is the amount of the damage. I will come to that later.

In all these issues the burden of proof rests upon the plaintiff Welstead to show a preponderance of evidence in favour of what he asserts. Adultery should be strictly proved, and when you come to consider whether or not it has been established you should exercise a cautious discretion in the matter, because,—apart from some of the matters which I will mention to you briefly—really the only evidence of adultery comes from the lips of Mrs. Welstead. Since it is a serious matter charged, as I say, you should proceed with caution before you decide that adultery has been established. So that to that extent there is a rather heavy duty cast upon the plaintiff to establish his case.

Assuming, without deciding, that the learned trial judge should have instructed the jury that a somewhat heavier burden lay upon the plaintiff in this regard, I am of opinion, after a consideration of all the evidence, that it can not be said that any miscarriage of justice resulted from the use of the language which he in fact employed.

Dealing with ground (vii) above, it does not appear in the record that the learned trial judge advised the wife of the appellant of the protection afforded to her by the proviso in s. 7 of the *Ontario Evidence Act*, R.S.O. 1937, c. 119, reading as follows:—

The parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in such proceeding; provided that no witness in any proceeding whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Counsel referred us to two divorce cases, *Laffin* v. *Laffin* (1), and *Waugh* v. *Waugh* (2), in which the Court of Appeal for Nova Scotia decided that evidence of a witness as to his own adultery given without objection in answer to questions put to him was inadmissible. It is not necessary to consider whether those cases were rightly decided. The relevant statutory provision is not identical with the Ontario section quoted above, or the corresponding statutory provision in force in England. The Nova Scotia section

(1) [1945] 3 D.L.R. 595, 18 M.P.R. 417.

(2) [1946] 2 D.L.R. 133, 19 M.P.R. 216.

is s. 38 of the *Evidence Act* of that Province as amended by 1936 c. 35, s. 1, and reads as follows:—

> The parties to an action or proceeding instituted in consequence of adultery, and their husbands and wives, shall be competent, but not compellable to give evidence; but the husband or wife, if competent only under this Chapter, shall not be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same action or proceeding in disproof of his or her alleged adultery or unless permission to ask such question is given by the Presiding Judge.

It will be observed that this section in terms forbids the asking of any question tending to show that the witness has been guilty of adultery unless one of the prescribed conditions exists, while the Ontario section relieves the witness from liability to be asked such questions.

In my opinion the law of Ontario is correctly stated by Logie J. in *Elliott* v. *Elliott* (1), particularly at page 212 where he says:—

> Nevertheless the privilege is the privilege of the witness, and if not taken advantage of by him or her, the evidence both at the trial and upon examination is admissible.

This is supported by the unanimous decision of the Court of Appeal in England in *Allen* v. *Allen and Bell* (2), where Lindley L.J. says:—

> The evidence with regard to the adultery is not rendered inadmissible, but protection is afforded to the witness from being questioned on the subject if the witness claims protection; but it is for the witness, and the witness only, to make the claim.

I am in agreement with the statement of Logie J. in *Elliott* v. *Elliott* (*supra*) at page 211:—

> As a matter of practice, the Judge, before any evidence is given, should inform the witness of the privilege given to him or her by sec. 7, and it would be well for counsel to advise the witness before he or she goes into the box at the trial or before the party is sworn in an examination for discovery, that he or she is not liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery unless such witness falls within the exception provided by the section itself.

In the case at bar it was, I think, obvious that the wife had decided to give evidence as to her own adultery, and I regard the omission to call her attention to the terms of the statute as unimportant.

(1) [1933] O.R. 206, 2 D.L.R. 40.

(2) (1894) P. 248 at 255.

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As to ground number (viii), referred to above, I think it clear that evidence that the child resembled the defendant was admissible. In *Doe Marr* v. *Marr* (1), Macaulay C.J., with the concurrence of McLean and Sullivan JJ. stated that such evidence is admissible when relevant to the issue. In the case at bar it was clearly relevant. In Wigmore on Evidence, 3rd Edition, section 166, page 624, the learned author says:—

> The English practice seems always to have admitted this evidence without question.

Since, in my opinion, all the grounds of attack upon the trial judgment fail it becomes unnecessary to deal with the terms on which the Court of Appeal directed a new trial, but I think it proper to say that I have been unable to find in the record justification of the criticism of counsel who appeared for the plaintiff at the trial. Even had the order for a new trial been upheld, in my opinion, the terms imposed upon the plaintiff could not have been allowed to stand. There was no room for any suggestion that the action was frivolous or vexatious and I know of no precedent for the order made. Cases arise from time to time in which the Court of Appeal in ordering a new trial will order a party to pay the costs of the former trial and of the Appeal in any event, but to make payment of such costs a condition precedent of the plaintiff's right to have his action tried might well result in a denial of justice.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

KELLOCK J.:—The first ground upon which the Court of Appeal acted in setting aside the judgment at trial was misdirection in their view, on the part of the learned trial judge, in failing to direct the jury with respect to the presumption of legitimacy and that the burden resting upon the appellant, in order to the displacement of the presumption was to adduce evidence producing in the minds of the jury a moral certainty.

In order to establish adultery in fact on the part of his wife, the appellant adduced evidence as to the blood analysis of himself, his wife and the child, thus directly challenging the legitimacy of the child. On that issue the law is, I think, clear.

(1) (1853) 3 U.C.C.P. 36.

In *Morris* v. *Davies* (1), Lord Cottenham L.C., quoting the unanimous opinion of the judges in the *Banbury Peerage* case, said at p. 215:—

That *in every case* where a child is born in lawful wedlock, the husband not being separated from his wife by a decree of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves to the *satisfaction* of those who are to decide the question, that such sexual intercourse did not take place at any time, when by such intercourse the husband could, according to the laws of nature, be the father of such child.

Lord Cottenham went on to say:

In the absence of all evidence, either on the one side or on the other, the law would presume that such sexual intercourse did take place.

After referring to the case of *Head* v. *Head* (2), he also said:

* * * all that is said by the present Master of the Rolls is, that the Court which is to be satisfied that sexual intercourse did not take place, must be so satisfied, not upon a mere balance of probabilities, but upon evidence which must be such as to exclude all doubt, that is, of course, all reasonable doubt, in the minds of the Court or jury to whom that question is submitted.

While it is now provided by R.S.O. 1950, c. 119, s. 6 that

* * * a husband or a wife may in any action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage,

I find nothing in this legislation which destroys the existence of the presumption on the one hand, or lowers the standard of proof as laid down in the authorities referred to. In my view, a child born in lawful wedlock is still presumed to be a legitimate child, and the presumption is to be overborne only by evidence excluding reasonable doubt. All that the statute does is to admit certain evidence which was previously excluded. The presumption is based upon a rule of public policy and its application is not limited, as argued by the appellant, to cases involving status of the parties.

It is argued for the respondent that, unless non-access be proven, all evidence directed to establishing the illegitimacy is inadmissible, but I find no such implied condition in the statute. Moreover, the statute has nothing to say as to the admissibility or otherwise of the medical evidence

(1) 5 Cl. & F. 163.

(2) 1 Sim. & Stu. 150 and Turn. & R. 138.

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which was adduced on behalf of the appellant and in my opinion it is not to be excluded on the basis of the rule of the common law. That rule grew up because of the then state of scientific knowledge, in which condition of things, a jury would, as pointed out by Lord Dunedin in *Russell's* case (1) at pp. 726-7, be faced with an impossible task. For that reason the law refused to permit any entry upon such an inquiry. If such evidence had not been given in the case at bar, then the evidence with respect to the question of legitimacy, even taking into consideration the evidence of the spouses themselves, might very well not have been, in the opinion of the jury, sufficient to remove all reasonable doubt. But with the medical evidence, if accepted by the jury, there could be no question of reasonable doubt. The illustration put forward by Lord Sumner in his dissenting opinion in *Russell's* case at p. 741 is apt:—

> If, both spouses being white themselves and of indubitably white ancestry on both sides, the wife bears a mulatto child of marked negro paternity, I do not see what need there is of further testimony about access, and I suppose (at least I hope) that common sense would prevail over presumption.

In my opinion, the medical evidence in the case at bar, if accepted by the jury, was of equal cogency with that suggested by Lord Sumner, and the omission of a direction to the jury as to their being satisfied beyond a reasonable doubt does not call for a new trial. If the evidence was in fact not accepted by the jury, then the direction actually given by the learned trial judge was adequate with relation to the other evidence on the issue of adultery. The evidence as to the paternity of the child was, of course, negative evidence and did not go further than to make out adultery in fact on the part of the wife of the appellant. In my opinion, therefore, it is not shown that there was any substantial wrong or miscarriage occasioned by the misdirection complained of, such as is required by R.S.O. 1950, c. 190, s. 28(1) before a verdict may be set aside.

I do not think effect ought to be given to the objection as to lack of proof that the appellant, his wife and the child were the subject of the blood tests as to which the medical evidence was given. In view of the course of the

(1) [1924] A.C. 687.

trial where no such objection was there raised, I think it is to be taken that the question of identity was, by both parties, treated as established.

The Court of Appeal was further of the view that the trial judge erred in failing to tell the jury that the fact that the birth of the child was registered under *The Vital Statistics Act,* raised a presumption of legitimacy under s. 6, subsection (3) of R.S.O. 1937, c. 88.

In the first place, the statute referred to by the court below is not the relevant statute, but rather c. 97 of the statutes of 1948. By s. 38, subsection (1) of that statute, a birth certificate shall contain only (*a*) the name of the child, (*b*) the date of birth, (*c*) place of birth, (*d*) sex, (*e*) date of registration, and (*f*) registration number. The exhibit here in question contained no more. By s. 41 subsection (1), such a certificate is admissible as *prima facie* evidence "of the facts certified to be recorded." Such facts do not bear upon the parentage of the child, and moreover it is provided by subsection (4) of s. 41 that notwithstanding subsection (1), no birth certificate shall be admissible in evidence to affect a presumption of legitimacy.

The last ground on which the judgment below was placed was error in the admission of conversations between the appellant and his wife with respect to the latter's misconduct. This evidence, given by both the appellant and his wife when called as a witness for the appellant, was not objected to. Not only so, but the respondent cross-examined both witnesses with respect to this subject matter, and there is ground for the inference that the respondent did not fail to object through inadvertence. The respondent had obtained, on examination of the appellant for discovery, his evidence on this subject in which he had stated that he had been informed by his wife that the adultery had taken place in March. This part of the discovery was used in the cross-examination of the appellant for the purpose of discrediting the evidence adduced on behalf of the appellant to the effect that the adultery had taken place in February. In addition, counsel for the respondent at the trial expressly agreed with the learned trial judge that the evidence of the wife as to what the appellant had said to her after her disclosure was admissible although not in proof of the act of adultery itself. In

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these circumstances, without relying upon the rule applied in *James* v. *Audigier* (1), I think it is now too late to object to the admission of this evidence at a trial had before a jury.

I would allow the appeal with costs here and below.

Appeal allowed and judgment at trial restored.

Solicitor for the appellant: *Benjamin Laker.*

Solicitor for the respondent: *A. W. S. Greer.*

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*Mar. 8, 9, 12, 13, 14

*Nov. 5

MARIE ANNA LANGLAIS (*Defendant*) ...APPELLANT;

AND

ELEANORA GERALDINE LANGLAIS PHILLIPS LANGLEY (*Plaintiff*) ... } RESPONDENT;

AND

GERARD BORNAIS .....MIS-EN-CAUSE.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Wills—Made in form derived from the laws of England—Whether formalities complied with—Whether revoked by subsequent holograph will which could not be found—Whether lost will could be proved by verbal evidence—Whether first will was revived—Arts. 831, 851, 860, 892, 893, 895, 896, 992, 1233(6) C.C.

On 22 April, 1947, by a will made in the form derived from the laws of England, the deceased instituted his sister, the appellant, his universal legatee. After his death in November 1948, the will was probated.

The respondent, deceased's only child, brought action in annulment of the will on the grounds of lack of essential formalities, of mistake as to the nature of the document signed and of non-competency of the testator. Subsidiarily, the respondent alleged that this will had been expressly revoked on 29 April, 1947—seven days after its completion—by an holograph will in her favour which could not be found but which she claimed to be entitled to prove by oral evidence.

The trial judge found that the formalities essential to the validity of the first will had been complied with. He further found that a second will revoking the first had been made, but since it could not be found he presumed that it had been destroyed animus revocandi and that

(1) (1932) 49 T.L.R. 36.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Cartwright and Fauteux JJ.

therefore the first was revived. The Court of Appeal for Quebec found that the deceased did not give to the first document the free adhesion of an enlightened will.

Held (Taschereau J. dissenting), that the appeal should be dismissed and that the deceased died intestate.

Per Rinfret C.J. and Kerwin, Cartwright and Fauteux JJ. (Taschereau and Kellock JJ. dissenting) (Rand J. expressing no opinion): When the deceased affixed his signature to the first document, he did not realize that he was signing a will and, furthermore, his mind and will did not accompany the physical act of execution; and in the determination of that question, the circumstances surrounding the making of the second will must be taken into account. (*Mignault* v. *Malo* (1) followed).

Rinfret C.J. was of the opinion that the holograph will could be proven by oral testimony, but the ratio of his disposition of the case rested on the nullity of the first will.

Per Rand, Kellock and Cartwright JJ.: It was possible under the law of Quebec to prove by oral testimony that the holograph will—which was not found—had been made and contained a revoking clause.

Per Kerwin, Taschereau and Fauteux JJ.: The respondent having failed to establish the precise fact as a result of which the holograph will was fortuitously lost or destroyed as required by Art. 860 of the Civil Code, this will could not be proven by oral testimony and, furthermore, it was not possible to divide it so as to treat it only as a writing revoking the first will within the meaning of Art. 892(2) since the revocation contained in a will not legally proved is null.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), reversing the decision of the trial judge and holding that the contested will was void.

Guy Hudon K.C. and Pierre Letarte K.C. for the appellant. The will of April 22, 1947, was valid. All the formalities essential to the validity of that will made in the form derived from the laws of England, as listed in Art. 851 C.C., had been complied with. Reliance was placed on *Wynne* v. *Wynne* (3) and *Gingras* v. *Gingras* (4).

The evidence shows that the testator was sane and nothing justifies the suggestion that he did, at any time up to his death, show any signs of mental weakness. It was therefore, in view of that, incumbent upon the respondent to establish precise, concording and conclusive facts showing that at the time of the making of the will, he was not competent to make a valid will. Respondent

(1) (1872) L.R. 4 P.C. 123.
(2) Q.R. [1950] K.B. 819.
(3) (1921) 62 Can. S.C.R. 74.
(4) [1948] S.C.R. 339.

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did not allege nor prove any one fact to show that the testator was not fully in possession of all his mental faculties.

The respondent, furthermore, has failed to establish without any doubt that the testator committed an error and signed the document not knowing that it was his will. The statements of fact on which the Court of Appeal based its conclusion that there had been error are contrary to the evidence and to the findings of the trial judge and do not justify the judgment appealed from. *Baptist* v. *Baptist* (1) and *Faulkner* v. *Faulkner* (2) referred to.

There is no evidence whatsoever of any undue influence, pressure or fraudulent manoeuvres or suggestions which would amount to same: *Mayrand* v. *Dussault* (3) and *Kaulbach* v. *Archbold* (4).

Even had the testator made the second will mentioned by the respondent, the latter would not be receivable to prove it by testimony. Para. 6 of Art. 1233 C.C. fixes the general conditions under which a writing which has been lost by unforeseen accident may be proved by testimony. The respondent did not allege nor prove any fact that constitutes or might constitute an unforeseen accident and nothing in the evidence heard on either side proves an unforeseen accident, which expression excludes a voluntary act of the testator and implies a material fact or an exterior event completely distinct from the voluntary destruction of the instrument by the testator. The unforeseen accident must be a fact which it was impossible to foresee and the evidence shows the existence of no such fact. In our law there is no presumption of loss resulting from the failure to produce the will after the death of the testator. The expression "unforeseen accident" in 1233 C.C. has definitively a broader meaning than "fortuitous event" in 860 C.C.

The provisions of Art. 860 C.C. are precise and they limit the general rule as set out in Art. 1233 C.C. The former deals with three circumstances but respondent's action only alleges the loss before the death of the testator and without his knowledge. Under that article, it was

(1) (1893) 23 Can. S.C.R. 37.
(2) (1920) 60 Can. S.C.R. 386.
(3) (1907) 38 Can. S.C.R. 460.
(4) (1901) 31 Can. S.C.R. 387.

incumbent upon the respondent to prove: (*a*) The destruction or loss. Failure to produce the will at the time of the death of the testator does not in itself constitute a shadow of evidence of such loss or destruction; (*b*) the fortuitous event; (*c*) the relation *causa causans* between the loss or destruction on one hand and the fortuitous event on the other; (*d*) a date sufficiently exact on which such destruction or loss would have taken place in order to determine if such destruction or loss took place before the death of the testator; (*e*) the ignorance of the testator. Neither the destruction, loss, fortuitous event, date or ignorance of the testator have been proved.

Furthermore, secondary evidence is a matter of exception and the conditions for its admissibility must be previously established: Beaudry-Lacantinerie 3rd Ed., Vol. XV, p. 328 and Mignault Vol. VI, p. 7.

Arts. 892, 895 and 896 C.C. deal with the revocation. In order that the contention of the respondent that even if the second will did not avail as a will, the cancellation clause contained therein could stand by itself and be admitted in evidence, be sound, it is pointed out that to be cancelled, the first will should be revoked by a notarial act or by an other written act in which the testator's change of intention is expressly stated (892 C.C. para. 2). It is again pointed out that such written act should be legally proved and that Art. 1233 para. 6 requires, in case of loss of this written act, evidence of an unforeseen event which brought about such loss. The first will was not destroyed nor was it torn or erased, and it was regularly probated. (892 C.C. para. 3). Neither is there any question of alienation or of judicial revocation. (892 C.C. para. 4 and 893 C.C.). It was not revoked by a posterior will which was legally proved. (892 C.C. para. 1). It is expressly enacted by Art. 895 C.C. that if the will is valid, properly proved, but remains without effect in its execution, the revocation remains. On the other hand, if the will is null on account of a defect of form, the revocation is null, that is, it is indivisible from the will itself, and if the will is non-existent as a will because it is not proved, the cancellation clause is non-existent for the same reason. (Demolombe, Vol. 22, Tome V, p. 131, Laurent, Vol. 14, p. 202 and Aubry et Rau, 5th Ed., Vol. 11, p. 511).

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Furthermore, under reserve and assuming proper proof of the second will, it was itself revoked by the destruction thereof by the testator with the indication of his intention to revive the former instrument. There are in the evidence sufficient grounds to conclude with the trial judge that the testator had decided to destroy the second will in order to revive the first. Art. 896 C.C. gives the trial judge the widest discretionary powers and authorizes him to take into consideration not only the circumstances, but even the indications of the testator's intention. The legislator does not mention formal proof of the testator's intention, it is sufficient that there be indications of this intention to empower the Court to make a decision. (Beaudry-Lacantinerie, Vol. XI, 3rd. Ed., p. 386 and *Moreau* v. *Ogilvie Flour Mills* (1).

Gustave Monette K.C., Maurice Gagné and Jacques Flynn for the respondent. The contested will was not executed by the testator with the full knowledge and appreciation of what he was doing and is void under Art. 831 C.C. for lack of a valid consent thereto. Art. 831 C.C. which requires the testator to be of sound intellect does not provide only for the nullity of the will made by the insane proper but also of the will made by a testator whose weakness of mind does not permit him to appreciate the character and the consequences of the act which he makes. (*Baptist* v. *Baptist* (2) and *Jeannotte* v. *Jeannotte* (3).) On the other hand, whatever be the reason for the error, if a person signs a will believing that he signs something else, it will also be void under 992 C.C. The evidence, when the question of error is raised after the death of the testator, may be made by way of presumptions resulting directly from the acts, the declarations and the behaviour of the testator before, during and after the execution of the will. The three following propositions are submitted on this point: (*a*) The testator was exposed to temporary derangements of intellect and to weakness of understanding, propitious to an error or confusion; (*b*) the testator did not give a valid consent to the contested will and (*c*) the nature of the disposition contained

(1) (1917) 55 Can. S.C.R. 403. (2) Q.R. 1 K.B. 447.
(3) Q.R. 22 K.B. 41.

in the contested will is not one which a man with the full knowledge of what he was doing, would have reasonably made under the circumstances.

The contested will is also void for lack of certain formalities required by Art. 851 C.C.: the testator did not personally request the witnesses to sign the will and did not in their presence acknowledge the document as his will nor attest his signature as having been subscribed thereto. All the formalities required by 851 C.C. are essential and are not only a question of form. (*Gingras* v. *Gingras supra* and Mignault, Vol. 4, p. 302).

The contested will is void under Art. 892 C.C., having been revoked by the subsequent holograph will of April 29, which could not be found and which the respondent claims to be entitled to prove by verbal evidence. This second will is only relied upon by the respondent as a revocation of the contested will. In view of the fact that the revoking will could not be found, the respondent, in order to succeed, has to satisfy the Court that: (*a*) This holograph will has existed; (*b*) The verbal evidence of the contents of this revoking will is admissible (860, 1233 C.C.); (*c*) The lost will was a valid revocation of the contested one (892, 894 C.C.); (*d*) The contested will has not revived (896 C.C.).

As to (*a*), the evidence is clear on that point and also that it was valid as to form.

As to (*b*), Art. 860 C.C. is concerned with the final proof of a lost will. It determines first, the rules of admissibility of verbal evidence and then, creates certain presumptions resulting from the loss or destruction of a will. The Codifiers and Mignault are of the opinion that the rule of admissibility of verbal evidence of a lost will is the same as the one provided for any other document. According to the authors and the jurisprudence, the meaning of "fortuitous event" in 860 C.C. and "unforeseen accident" in 1233 C.C. is the same. The rule is exactly the same under both dispositions, and the general rule is to the effect that the claiming party must establish that the non production of the document of which he seeks to adduce verbal evidence, is not due to his fault. Further, the impossibility to produce the document because of the act of a third person is equivalent to an unforeseen acci-

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dent or fortuitous event. (Demolombe, Vol. 30, No. 202, Mignault, Vol. 6, p. 75, *Ball* v. *Roland* (1), *Bienvenue* v. *Lacaille* (2), *René* v. *Mallette* (3), *Brown* v. *Brown* (4) and *Barkwell* v. *Barkwell* (5)). The searches made were sufficient to discharge the onus. It is quite clear that the fact that the will cannot be produced is not the result of the respondent's fault or negligence. Since respondent never had control of the document, there is no obligation to establish without doubt the date and the manner or accident in which the will may have been lost or destroyed. The loss is one which occurred by inexplicable circumstances while the document was in the hands of another and such loss is equivalent to an unforeseen or fortuitous event.

Since the respondent is not asking for the probate of the lost will and is not seeking a declaration that she is the universal legatee thereunder, she is entitled to prove the contents of the will for purposes of revocation of a prior will, even if the will, by reason of its loss or destruction, is to be presumed to be itself revoked. There is nothing in para. 3 of Art. 860 C.C. that can be construed as meaning that a will presumably revoked as a result of its loss, cannot be proved by verbal evidence for any legal purpose, such as the proof of a revocation therein contained. Mignault takes the same view at p. 278, Vol. 4. To say that a will, presumably revoked as a result of its loss or destruction can never be proved by verbal evidence leads to ridiculous consequences and brings Art. 860 C.C. into conflict with many well settled principles of our law as well as with Arts. 892 and 896 C.C.

Even if it should be true that paras. 2 and 3 of Art. 860 C.C. contain rules of evidence with the consequence that the respondent would have the further onus of establishing that the will was lost without the knowledge of the testator or alternatively that he manifested his intention of maintaining its provisions, the respondent has satisfied such onus.

As to (*c*), the dispositions of Arts. 892 and 895 C.C. are to the effect that a will may be revoked by another will either expressly or impliedly and the revoking will must

(1) Q.R. 22 R.L. (N.S.) 178.
(2) Q.R. 17 K.B. 464.
(3) Q.R. 64 S.C. 339.
(4) 8 E. 2 B. 876.
(5) (1928) L.R.P. 91.

be valid as to form. These two conditions were established in the evidence and also that it was made subsequently to the contested will.

As to (*d*), the meaning of Art. 896 C.C. is that a will once it is revoked, remains without effect unless the testator should have made some express disposition to the contrary or unless there be in evidence circumstances and indications of the intention of the testator to the effect that the prior will should be revived. Therefore, assuming the verbal evidence of the contents of the lost will to be admissible, the contested will has been revoked and cannot revive in the absence of such evidence. Moreover once the revocation was established, the onus was on the appellant. That onus was not satisfied. The respondent, without prejudice to its position, has even undertaken to prove that the testator never had the intention to revive his first will.

Hudon K.C. replied.

THE CHIEF JUSTICE: M. J. A. F. Langlais, qui habitait Lancaster, aux États-Unis, vint demeurer dans la Cité de Québec deux ans avant sa mort. Il a fait son testament le 22 avril 1947 en faveur de sa soeur, qui est l'appelante. Ce testament fut contesté par sa fille, qui est l'intimée.

Les motifs de la contestation sont que:

(1) Le testament en faveur de l'appelante, fait suivant la forme dérivée de la Loi d'Angleterre, n'est pas revêtu des formalités exigées par l'article 851 du *Code Civil*;

(2) Lorsque ce testament a été fait, M. Langlais ne jouissait pas de toutes ses facultés mentales, et, dans ces conditions, l'écrit invoqué comme testament "n'a pas reçu l'adhésion libre d'une volonté éclairée".

(3) Le testateur ne s'est pas rendu compte qu'il signait un testament, mais qu'il aurait cru signer autre chose;

(4) Sept jours après le testament contesté, Langlais l'a révoqué par un testament olographe valide et qui doit prévaloir. Sur ce point, l'explication est que, informé par un ami que, sans le savoir, il avait réellement signé un testament le 22 avril, il s'empressa, le 29 avril, de faire un testament olographe pour mettre de côté le testament qui est maintenant contesté.

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La Cour Supérieure a été d'avis que toutes les formalités requises par la loi étaient remplies et observées dans l'exécution du testament du 22 avril 1947.

Elle a été également d'avis que Langlais savait qu'il avait fait un testament, le 22 avril 1947, mais elle ne précise pas qu'il s'en rendait compte au moment où il l'a signé.

Comme le fait remarquer particulièrement l'honorable Juge Pratte, de la Cour du Banc du Roi (en Appel) (1), dans ses notes, "il convient de noter que le premier juge ne s'est pas prononcé expressément sur la sanité d'esprit du testateur."

Le juge de première instance a également écarté le motif que Langlais aurait été la victime d'une erreur. Cette erreur eut pu se déduire des déclaration faites, dès le soir même, par le testateur à mademoiselle Ouellet, qui avait servi de témoin au testament du 22 avril, et également à l'abbé Brochu, quelques jours après. Mais, de l'avis de la Cour Supérieure, "les preuves de l'accomplissement des formalités requises pour le testament du 22 avril 1947 sont tellement précises et certaines qu'elles ne pourraient être mises de côté par cette question et réponse dont parle mademoiselle Ouellet."

Enfin, sur l'existence du second testament (qui n'a pu être retrouvé après la mort de Langlais), la Cour Supérieure s'est prononcé en décidant que ce testament avait existé, qu'il revoquait le testament du 22 avril 1947, "pourvu toutefois qu'il laissait subsister la révocation; mais s'il détruisait le document qui révoquait, il devait savoir que la révocation projetée devenait caduque."

Ce second testament avait d'abord été confié à la garde de l'abbé Brochu. Un an après, savoir: en juin 1948, Langlais vint le reprendre en disant qu'il désirait y faire des modifications; mais, ajoute le juge de première instance, personne ne l'a vu après cela. Le juge en conclut que "le fait de reprendre le document pour le modifier, impliquait qu'il allait détruire le premier, et le remplacer par un autre; s'il n'y avait que des modifications tout en laissant subsister les premières dispositions, il n'avait qu'à ajouter par codicile; du moment qu'il détruisait le premier

(1) Q.R. [1950] K.B. 819.

(N.B.—le juge ici veut dire le testament olographe qui révoquait le testament en la forme dérivée de la Loi d'Angleterre), Langlais mit fin à tout son contenu, et s'il désirait remettre en vigueur quelque partie de ce qu'il avait détruit, il devait le faire expressément; il n'a pas fait ça, et ne faut-il pas conclure qu'il ne désira pas revivre ce qu'il avait détruit . . . si, lors de sa mort, cinq mois plus tard, ce testament n'existait plus, il y a à présumer qu'il l'a détruit; de l'avis de cette Cour (Supérieure), le dossier n'autorise pas d'autre présomption de fait, et des intentions qu'il aurait exprimées verbalement ne pourraient constituer un testament, et ne pourraient constituer une révocation de testament."

Avec ces considérations l'honorable juge de première instance en vint à la conclusion que le testament du 22 avril 1947 devait être reconnu comme légal et valable, et qu'il devait être déclaré que ledit testament n'avait pas été révoqué.

L'action de l'intimée fut donc rejetée.

Le jugement formel de la Cour d'Appel (1) fait remarquer d'abord "que le premier juge a trouvé que les formalités nécessaires à la validité du testament attaqué auraient été accomplies; et que c'est de cela seulement qu'il a conclu que le testateur avait dû comprendre ce qu'il faisait en signant ce testament; . . . que tout en reconnaissant que le testateur avait, le 29 avril 1947, fait un second testament qui révoquait le premier, le juge de première instance a décidé que le fait que ce dernier testament n'avait pu être retrouvé faisait présumer que le testateur l'avait volontairement détruit dans l'intention de laisser subsister le testament du 22 avril 1947."

Mais la Cour du Banc du Roi, suivant ce que Langlais avait lui-même déclaré à garde Ouellet quelques minutes après qu'il eut signé le testament attaqué, considéra que Langlais ne se serait pas rendu compte qu'il avait signé un testament, mais qu'il aurait cru signer autre chose; d'autant plus que, par la suite, il fit d'autres déclarations, au même effet, à l'intimée, ainsi qu'à l'abbé Brochu devant qui il avait fait, le 29 avril, le testament olographe invoqué par l'intimée.

(1) Q.R. [1950] K.B. 819.

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Puis, le jugement formel contient le considérant suivant:

CONSIDÉRANT qu'il ressort de l'ensemble de la preuve qu'au moment où il a fait le testament du 22 avril, Firmin Langlais ne s'est pas rendu compte de ce qu'il faisait, mais qu'il croyait faire autre chose; et que l'écrit signé dans ces conditions n'a pas reçu l'adhésion libre d'une volonté éclairée, et que, partant, il doit être annulé.

Et, comme l'intimée est la seule héritière légale de Firmin Langlais, la Cour du Banc du Roi fit droit à l'appel, annula le testament fait par Firmin Langlais, le 22 avril 1947, déclara l'intimée la seule héritière légale de ce dernier et ordonna à l'appelante de rendre compte des biens délaissés par Langlais et de les remettre à l'intimée avec dépens.

D'après moi, le testament du 29 avril a effectivement révoqué celui du 22 avril; et, en toute déférence, le jugement de première instance, qui a reconnu l'existence du testament du 29 avril, ainsi que le fait de la révocation, qui y était contenue, du testament du 22 avril, a commis une erreur de droit manifeste en décidant que la destruction (que, d'ailleurs, il a présumée) du second testament avait eu pour effet de faire revivre le premier.

Devant la Cour Suprême, le savant avocat de l'appelante n'a pas contesté la décision du juge de première instance sur le fait de l'existence du testament du 29 avril et le fait que ce testament contenait la révocation du testament du 22 avril, sauf qu'il a discuté l'admissibilité de la preuve qui en a été faite.

Sur cette question, il y a lieu d'abord de voir ce que dit l'article 1233 du *Code Civil*, en vertu duquel la preuve testimoniale est admise "dans les cas où la preuve écrite a été perdue par cas imprévu, ou se trouve en la possession de la partie adverse, ou d'un tiers, sans collusion de la part de la partie réclamante, et ne peut être produite" (sous-paragraphe 6).

Ici, il fut prouvé et accepté par la Cour Supérieure que le testament du 29 avril avait existé, qu'il contenait la révocation du testament antérieur, mais que le document lui-même ne pouvait être produit "sans collusion de la part de la partie réclamante." La preuve a démontré qu'à la suite de la mort de Langlais, toutes les parties intéressées, même celles qui n'avaient pas vu le testament olographe, firent une recherche diligente pour le trouver dans tous les endroits où il était possible ou probable que ce testament pouvait être. Elles ne le trouvèrent pas.

D'après la jurisprudence constante, c'est là tout ce qui peut être exigé pour établir la perte d'une preuve écrite et pour donner ouverture à la preuve testimoniale. Le savant procureur de l'appelante a beaucoup insisté, au cours de son argumentation, pour signaler que le sous paragraphe 6 contient les mots: "Dans les cas où la preuve écrite a été perdue par cas imprévu", et il en déduisait qu'il fallait, pour l'intimée, prouver que le testament du 29 avril avait été perdu "par cas imprévu". Mais cette exigence est exagérée et n'est pas admise par la doctrine; d'autant plus que, si l'on peut supposer des cas où celui qui invoque un document perdu peut établir de quelle façon il l'a été, comme, par exemple, perdu au cours d'un incendie, ou perdu parce qu'il a été échappé à la mer ou dans un fleuve, dans la majorité des cas le fait même qu'il est perdu implique qu'il l'a été par cas imprévu. La plupart du temps, la perte n'en est constatée que parce que l'on ne peut pas le retrouver. Ce n'est pas au moment même où la perte s'effectue que l'on s'en aperçoit, ce n'est que plus tard, et, quelquefois, beaucoup plus tard que, lorsqu'on procède à le chercher, il devient impossible de le retracer et qu'il faut alors se rendre à l'évidence que le document est perdu. Cela même constitue le cas imprévu dont parle le Code, car, dans ces circonstances, il est évident que celui qui a eu le document en mains et à qui il est devenu impossible de le retrouver n'a, en aucune façon, prévu le cas.

Il me paraît donc que si l'article 1233 (6) constitue la règle générale concernant la preuve testimoniale d'un document écrit qui a été perdu, l'intimée, dans le cas qui nous occupe, a justifié des conditions exigibles pour que le testament olographe du 29 avril 1947 put être prouvé verbalement. C'est, d'ailleurs, ce qu'admet, en l'espèce, la Cour Supérieure qui a décidé que ce testament avait existé et qu'il contenait la révocation du testament antérieur.

Mais l'article 860 du *Code Civil* traite également du cas où la minute ou l'original d'un testament ont été perdus ou détruits par cas fortuit, après le décès du testateur, ou sont détenus sans collusion par la partie adverse ou par un tiers. Il édicte que, pour ce cas, la preuve de ce testament peut être faite en la manière réglée pour le cas quant aux autres actes et écrits au titre *Des obligations*. Il réfère donc précisément à l'article 1233 (6).

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Le même article 860 C.C. pourvoit au cas où le testament a été détruit ou perdu avant le décès du testateur, sans qu'il ait connu le fait, et, alors, la preuve peut également s'en faire comme si l'accident n'était arrivé qu'après son décès. Enfin, si le testateur a connu la destruction ou la perte du testament et s'il n'y a pas suppléé, il est censé l'avoir révoqué, à moins d'une manifestation postérieure de sa volonté d'en maintenir les dispositions.

Cet article se trouve dans la Section III du chapitre des testaments qui est intitulée: "De la Vérification et de la Preuve des Testaments."

Le savant avocat de l'intimée a suggéré que l'on aurait pu se demander si l'article 860 ne s'applique pas uniquement à la vérification d'un testament. Sur ce point, le Rapport des Commissaires lui donne tort. Il déclare, au contraire, que cet article "ne s'occupe pas de la vérification, mais de la preuve finale même du testament perdu, détruit ou recélé; il est conforme aux autorités des deux origines, et aussi à ce qui a été adopté quant aux actes en général au titre des obligations." Le Rapport des Commissaires ajoute: "La distinction entre le cas où le testateur a connu la perte de l'acte et celui où il ne l'a pas connue, forme le caractère particulier de la présente disposition."

En effet, le premier paragraphe de l'article 860 C.C. suppose le cas où la minute ou l'original d'un testament ont été perdus ou détruits après le décès du testateur. Dans ce cas, il est évident que le testateur n'y a été pour rien et la preuve peut en être faite "en la manière réglée pour le cas quant aux autres actes et écrits au titre *Des Obligations*." (C.C. article 1233 (6)).

Le second paragraphe de l'article 860 suppose le cas où le testament a été détruit ou perdu avant le décès du testateur, mais, hors la connaissance de ce dernier. Dans ce cas, "la preuve peut également s'en faire comme si l'accident n'était arrivé qu'après son décès."

Mais le troisième paragraphe de l'article 860 dispose du cas où le testateur a connu la destruction ou la perte du testament. Dans ce cas s'il n'y a pas suppléé, "il est censé l'avoir révoqué, à moins d'une manifestation postérieure de la volonté d'en maintenir les dispositions."

La distinction faite dans l'article même entre les différents cas qu'il suppose éclaire, à mon avis, la question qui a été discutée devant cette Cour dans la présente cause et qui est de savoir si les mots "par cas fortuit", qui se trouvent dans le premier paragraphe, s'appliquent à la fois au mot "perdus" et au mot "détruits", ou s'ils ne s'appliquent, au contraire, qu'à ce dernier mot seulement.

L'on constate que tout l'article 860 fait réellement la distinction entre le cas où le testateur lui-même a connu la perte ou la destruction et le cas où il ne l'a pas connue. Et c'est bien sur cela que les codificateurs ont attiré l'attention dans leur Rapport. Il est, en effet, parfaitement logique de supposer que, si le testateur a connu la perte ou la destruction (ainsi, d'ailleurs, que l'édicte le troisième paragraphe), on doit en conclure qu'il a eu l'intention de le révoquer; "à moins", ajoute ce paragraphe, "qu'il ait postérieurement manifesté la volonté d'en maintenir les dispositions."

En ce sens, les mots "par cas fortuit", dans le premier paragraphe de l'article 860 étaient essentiels, puisqu'ils ont pour but de faire la distinction entre une destruction qui résulterait de l'acte du testateur lui-même et une destruction qui résulterait d'un événement extérieur hors du contrôle du testateur. Il n'est pas facile de voir comment les mots "par cas fortuit" pourraient s'appliquer au mot "perdus". Sans doute, ainsi que je l'ai dit plus haut, il y a des cas où la perte est due à un cas fortuit et peut être vérifiée, mais l'idée même que comporte le mot "perdus" implique un cas qui ne peut être expliqué. L'on sait que l'écrit existait; l'on ne se rappelle plus où on l'a placé; l'on ne peut plus le retrouver. De toute façon, il est perdu, mais l'on ne saurait dire qu'il a été perdu "par cas fortuit." En fait, l'on ignore absolument comment il a été perdu. C'est sans doute un "cas imprévu", ainsi qu'y pourvoit le sous-paragraphe 6 de l'article 1233, mais ce n'est pas un "cas fortuit", ainsi que le définit le *Code Civil* lui-même au sous-paragraphe 24 de l'article 17. Cette définition est certainement loin d'être satisfaisante, parce que, tâcher de faire comprendre le "cas fortuit" en l'accolant à la notion de force majeure, n'aide guère, surtout si l'on considère qu'à travers tout le *Code* le "cas fortuit" et la force majeure sont pour ainsi dire assimilés dans leurs effets.

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Mais, à tout événement, si la minute ou l'original d'un testament ont été perdus dans les conditions prévues par l'article 860 (1), et, c'est-à-dire, de façon qu'ils ne puissent pas être représentés, c'est l'article 1233 (6) qui pourvoit à la preuve testimoniale, pourvu que le testateur n'ait pas connu le fait de leur perte.

Ici, à mon humble avis, l'intimée a établi toutes les circonstances qui pouvaient justifier l'admission de la preuve testimoniale et je partage l'opinion du juge de première instance qui a conclu à cette admissibilité.

Sur cette question, je ne vois pas comment on peut s'en rapporter à la jurisprudence ou à la doctrine française. L'article 860 du *Code Civil* de la province de Québec édicte les conditions d'admissibilité de la preuve testimoniale en les précédant des mots: "Lorsque la minute ou l'original d'un testament ont été perdus ou détruits par cas fortuit." Et, d'autre part, l'article 1233 (6) parle des "cas où la preuve écrite a été perdue par cas imprévu."

Il en est autrement du seul article correspondant du *Code Napoléon* (1348) qui est exprimé comme suit: "Au cas où le créancier a perdu le titre qui lui servait de preuve littérale par suite de cas fortuit, imprévu, résultant d'une force majeure."

On ne saurait interpréter un article qui exige "un cas fortuit, imprévu, résultant d'une force majeure" de la même façon que l'article 1233 (6) qui ne parle que du "cas imprévu." Ici, le cas fortuit et la force majeure sont éliminés, et, en plus, l'article français exige même, pour le cas imprévu, qu'il résulte d'une force majeure.

Le même raisonnement s'impose à l'égard de l'article 860 qui n'a pas de texte correspondant dans le *Code Napoléon* et qui, pour l'admissibilité de la preuve testimoniale, exige que la minute ou l'original d'un testament aient été "perdus ou détruits par cas fortuit."

Au surplus, l'article 1348 du *Code Napoléon* parle seulement du créancier qui a perdu le titre qui lui servait de preuve littérale et, dans ce cas évidemment, la doctrine qui écarte la preuve testimoniale, à raison de la négligence que comporterait de la part du créancier la perte de son titre, ne saurait s'appliquer à un légataire qui n'a jamais

eu le testament en sa possession. Si, comme le supposent certains auteurs, le fait de la perte d'un document doit être imputé à la négligence de celui qui le détenait, cela ne peut jamais s'appliquer à un légataire. Ce raisonnement ne vaudrait qu'à l'égard du testateur ou d'un tiers qui aurait eu le document en sa possession et, dès lors, l'argument basé sur la négligence ne peut être invoqué contre le légataire.

Tout cela est bien souligné par la Cour de Révision, à Montréal, dans le jugement de *Filiatrault* v. *Feeny* (1). Au cours de ce jugement, l'on fait remarquer que les expressions du *Code Napoléon* dénotent une sévérité beaucoup plus grande dans la latitude donnée aux parties de prouver la perte d'un document et son contenu. Dans cette affaire, les parties avaient conclu un contrat devant notaire. La loi de la province de Québec exige que le notaire conserve avec grande précaution un document qu'il reçoit; mais, par quelque circonstance inexpliquée, la minute ou l'original du document avait disparu sans la faute des parties. Le notaire prouva qu'il avait fait des recherches diligentes et continues pour retrouver l'original et qu'il ne pouvait pas le trouver; il ne pouvait que constater sa disparition.

La Cour de Révision commença par citer Greenleaf, On Evidence, p. 558:

> If the instrument is lost, the party is required to give some evidence that such a paper existed, though slight evidence is sufficient for this purpose, and that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found; after which his own affidavit is admissible to the fact of its loss. It must be recollected that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument, and that this is a preliminary inquiry addressed to the discretion of the judge . . . Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence of its contents.

En pareil cas et appliquant l'autorité ainsi citée, la Cour décida que, dans les circonstances, "this constitutes a *'cas imprévu'*, or *unforeseen accident* sufficient to justify secondary proof." En l'espèce, ce jugement confirmait celui de la Cour Supérieure.

(1) Q.R. 20 S.C. 11.

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Plus tard, en 1926, l'honorable juge Albert de Lorimier, dans l'affaire de *René* v. *Mallette* (1), décida que "la preuve de l'existence et subséquemment de la suppression ou de la perte d'un testament olographe ne doit pas nécessairement se faire d'une façon directe, mais elle peut résulter d'un ensemble de présomptions graves, précises et concordantes."

Et il est très important de noter que le juge de première instance, en plus d'avoir admis la preuve testimoniale, a apprécié cette preuve dans le sens que l'existence du testament olographe était prouvée et qu'il était également prouvé que ce dernier testament contenait la révocation du premier.

Sur ce point, la Cour du Banc du Roi (2) ne s'est pas prononcée parce qu'elle a trouvé que les autres motifs de mettre de côté le testament du 22 avril étaient suffisants.

Mais, il est également important de remarquer que l'article 860 C.C. parle du testament initial, alors que sur la question de révocation, le *Code Civil* contient toute une série d'articles qui s'y appliquent spécialement. Ce sont les articles 892 et suivants.

Or, un testament, et, dans l'espèce, celui du 22 avril, pouvait être révoqué par le testateur "par un testament postérieur qui le révoque expressément ou par la nature de ses dispositions." C'est là le premier paragraphe de l'article 892 C.C.

L'on peut également citer le deuxième paragraphe de cet article, en vertu duquel un testament peut être révoqué "par un acte devant notaire ou autre acte par écrit, par lequel le changement de volonté est expressément constaté."

Il s'ensuit que du moment qu'il est admis, comme l'a décidé le juge de première instance (et il avait dans la preuve toute la justification nécessaire pour appuyer cette décision), que le testament olographe du 29 avril a existé et que son contenu était prouvé, à savoir, qu'il contenait une révocation du testament en la forme dérivée de la Loi d'Angleterre, du 22 avril 1947, l'on a donc ici soit, suivant les exigences du premier paragraphe, un testament postérieur qui a révoqué expressément le testament du 22 avril, soit au moins un acte par écrit par lequel le

(1) Q.R. 64 S.C. 339. (2) Q.R. [1950] K.B. 819.

changement de volonté de Langlais a été expressément constaté. Que l'on choisisse l'un ou l'autre cas, la révocation a été faite.

Et c'est là suivant moi, je le répète en toute déférence, que le juge de première instance a erronément interprété la loi en décidant que la destruction du testament olographe, qu'il a présumée simplement parce que ce testament n'avait pas pu être retrouvé et produit, constitue, de la part de Langlais, l'intention de faire revivre le premier testament en date du 22 avril 1947. C'est là exactement le contraire de ce qui est pourvu aux articles 895 et 896 du *Code Civil* à l'effet que "la révocation faite dans un testament postérieur conserve tout son effet, quoique ce nouvel acte reste sans exécution par l'incapacité du légataire ou son refus de recueillir." A quoi l'article 896 ajoute: "A défaut de disposition expresse, c'est par les circonstances et les indices de l'intention du testateur qu'il est décidé si la révocation du testament qui en révoque un autre, est destinée à faire revivre le testament antérieur."

Le jugement de la Cour Supérieure, après avoir pris pour acquis que si on n'avait pu retrouver le testament olographe du 29 avril, il était à présumer que le testateur l'avait détruit (une présomption qui ne résulte nullement des circonstances et des indices que l'on peut déduire de la preuve), prenant cette déduction pour acquise, en a conclu que le testateur avait voulu faire renaître le premier testament. Telle n'est pas la loi.

Que l'on envisage le testament olographe du 29 avril comme un testament postérieur qui révoquait expressément le testament du 22 avril (fait qui est décidé par le juge de première instance), ou qu'on l'envisage comme "un autre acte par écrit par lequel le changement de volonté est expressément constaté", dans l'une comme dans l'autre hypothèse la révocation, ayant été faite dans un testament postérieur, a conservé tout son effet (C.C. 895).

La révocation n'eût pu être nulle que si elle eut été "contenue dans un testament nul par défaut de forme."

Ici, il n'est nullement prétendu que le testament olographe du 29 avril était nul par défaut de forme. Il n'y a, à cet égard, ni allégation ni preuve.

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Mais, en plus, à supposer que le testament olographe du 29 avril ne puisse être maintenu comme testament, il resterait qu'il constitue au moins "un acte par écrit par lequel le changement de volonté est expressément constaté" de la part du testateur, conformément au paragraphe 2 de l'article 892 C.C. La révocation contenue dans cet acte par écrit aurait pour effet d'annuler le testament du 22 avril, vu qu'il n'est pas établi de disposition expresse qui aurait été destinée à faire revivre ce testament antérieur. Au surplus, on ne saurait trouver dans le dossier des circonstances ou des indices de l'intention du testateur de faire revivre le testament antérieur, si même l'on admet qu'il a détruit le testament olographe du 29 avril.

Bien respectueusement, c'est précisément de cette situation dont le juge de première instance ne paraît pas s'être avisé.

Tout d'abord, il n'avait aucune justification pour présumer de la destruction du testament du 29 avril par le seul fait que ce testament ne pouvait pas être retrouvé. Et, même si cette destruction devait être présumée, il ne s'ensuit pas, d'après les articles 895 et 896 C.C. que, par cette prétendue destruction, Langlais avait l'intention de faire revivre le testament en la forme dérivée de la Loi d'Angleterre du 22 avril.

Voilà pour la question légale. Si cela était nécessaire, j'ajouterais que les circonstances et les indices que l'on peut déduire de la preuve établissent, au contraire, que Langlais n'a jamais eu l'intention de faire revivre son premier testament.

Ce que je viens de dire me paraît suffisant pour arriver à la conclusion que l'appelante ne saurait réussir et il devient donc inutile d'examiner les autres moyens soulevés en cette cause.

Mais, depuis que j'ai écrit les notes qui précèdent, j'ai eu l'avantage de prendre connaissance de celles de mon collègue, le juge Fauteux, et je dois dire que je concours entièrement avec l'opinion qu'il exprime quant à la validité que l'on doit accorder au testament du 22 avril 1947, et dans lesquelles il accepte, en substance, l'avis de la Cour du Banc du Roi (en appel) sur l'efficacité de ce premier testament.

Cependant, il m'incombe de choisir entre les deux alternatives qui se présentent et décider si l'intimée doit être considérée comme légataire, en vertu du testament du 29 avril 1947 (le second), ou comme héritière, à la suite du jugement de la Cour du Banc du Roi (en appel) qui s'est contenté de déclarer que le testament du 22 avril (le premier) devait être mis de côté. Ce choix est nécessaire pour permettre à l'intimée de savoir si elle doit faire vérifier le second testament ou s'il sera suffisant qu'elle produise une déclaration d'hérédité.

Comme c'est à cette dernière alternative que s'est rallié le jugement dont est appel, ainsi que la majorité des juges de notre Cour; et comme il ne s'agit, en somme, que de déterminer en vertu de quelle procédure l'intimée pourra prendre possession des biens de la succession de son père, je crois que pour toutes fins pratiques je devrais adopter le résultat auquel en est venue la majorité de mes collègues, et je déclare donc qu'elle doit être considérée comme venant aux biens de son père en sa qualité d'héritière en vertu de la loi. C'est d'ailleurs l'unique conclusion de la déclaration en cette cause. Dans les circonstances, j'adopte, sur la disposition du présent appel, les conclusions exprimées dans les raisons de M. le juge Fauteux.

L'appel doit être rejeté avec dépens.

KERWIN J.: For the reasons given by Mr. Justice Fauteux, I agree that when the deceased affixed his signature to the document dated April 22, 1947, he did not realize that he was signing a will and, furthermore, that his mind and will did not accompany the physical act of execution. If there were nothing more in the case, that would be sufficient to dismiss the appeal but it is alleged that, in any event it has been legally proved, on April 29 the deceased executed a holograph will revoking the document of April 22 and bequeathing everything he owned to the respondent and that therefore it should be declared that the respondent took under that will.

For all that appears in the record the testator may have destroyed the holograph will, either with the intention, which was never carried out, of making a new will,

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or without such intention. Under Article 892 of the Quebec Civil Code a will may be revoked:—

2) By means of a notarial or other written act by which the change of intention is expressly stated.

If the document of April 29 be taken merely as an "act" and not a will, then Article 860 has no application as it refers only to wills. We must then refer to Article 1233 (6) in the 3rd Title "Of Obligation", Sec. III "Of Testimony":—

1233. Proof may be made by testimony: . . .

6. In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced.

There is no proof that the writing has been lost by unforeseen accident because despite the testimony as to the searches that were made for the holograph will, there is, as stated above, nothing to show that the testator did not destroy it.

If, on the other hand, the document be taken as a will, Article 860 would apply:—

If the will have been destroyed or lost before the death of the testator, without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death.

Again there is no evidence that the will was destroyed or lost without the fact coming to the knowledge of the testator. On each of these points therefore, I agree with the reasons of Mr. Justice Taschereau.

I should add that I am unable to obtain any assistance in the construction of the relevant articles of the code from the reports of the codifying Commissioners because I find it impossible to say what part of any article was taken from French sources and what part from English sources. On this point I think the statement of Sir Montague Smith, speaking for the Judicial Committee in *Symes* v. *Cuvillier* (1) is appropriate to the present appeal:—

This authority (i.e. the reports of the Commissioners) is no doubt entitled to respect; but the opinion of the Commissioners has not the weight of a judicial opinion pronounced after discussion and argument.

In accordance with the dispositif of the formal judgment of the Court of Appeal, the respondent is therefore the

(1) (1880) 5 A.C. 138 at 158.

sole legal heiress of Joseph Alfred Firmin Langlais and the appeal should be disposed of as proposed by Mr. Justice Fauteux.

TASCHEREAU J. (dissenting): Il s'agit dans la présente cause d'un appel d'un jugement rendu par la Cour du Banc du Roi de la province de Québec (1), renversant le jugement de l'honorable Juge Gibsone. Le montant en litige est d'environ $100,000.00 et nous avons à déterminer s'il doit être attribué à l'appelante, Marie-Anna Langlais, sœur du de cujus,Alfred Firmin Langlais, ou à sa fille Eléanora Géraldine Langlais, qui est intimée dans la présente cause.

Firmin Langlais, le testateur, est décédé à Beauport, près de Québec, le 29 novembre 1948, à l'âge de 82 ans et trois mois. Il avait passé une grande partie de sa vie à Lancaster, Pennsylvanie, mais revenait de temps en temps à Québec, où il se retirait chez sa sœur madame Thivierge. Il était veuf depuis de nombreuses années, et durant cette même période de trente-cinq ans, il n'a jamais revu sa fille l'intimée, sauf lorsqu'il est revenu à Québec, en avril 1947, pour assister aux funérailles de sa sœur madame Thivierge. L'intimée en effet était partie à l'âge de 16 ans pour New York, où elle passa plusieurs années, et ensuite se rendit à Toronto, où elle épousa un monsieur Phillips maintenant décédé, et avec qui elle eut un fils qui, à l'époque de l'instruction de la cause, était âgé de 25 ans. En novembre 1943, madame Phillips ainsi que son fils, par jugement de la Cour de Comté d'Ontario, firent changer leur nom en celui de Langley.

Madame Thivierge, sœur de Firmin Langlais, est décédée à Québec le 14 avril 1947, laissant une succession évaluée à $250,000.00. Par son testament reçu devant les notaires Jos. Sirois et Laurent Lesage, elle nomma M. F. St-Pierre de Montréal, exécuteur testamentaire, et Marie-Anna Langlais et Firmin Langlais, ses sœur et frère, légataires universels par parts égales. Après paiement des legs particuliers et des dons de charité, chaque légataire touchait environ $100,000.00. Avant d'hériter ainsi, Firmin Langlais ne possédait rien, et il semble que ses voyages à Québec étaient payés par madame Thivierge.

(1) Q.R. [1950] K.B. 819.

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Firmin Langlais vint de Lancaster pour assister aux funérailles de sa soeur à Québec, et l'intimée, qui n'avait pas vu ses tantes madame Thivierge et Marie-Anna Langlais, ni son père depuis trente-cinq ans, vint également de Toronto. Durant quelque temps, M. Langlais habita la maison de sa sœur dont il avait hérité, et plus tard il demeura à l'Hospice Du Fargy à Beauport, refuge pour les vieillards, où il mourut le 28 novembre 1948. Par son testament fait le 22 avril 1947, d'après le mode dérivé de la loi d'Angleterre, il nommait le mis-en-cause, M. Gérard Bornais, exécuteur testamentaire, et l'appelante, Marie-Anna Langlais, sœur du de cujus, était légataire universelle.

Dans son action instituée devant la Cour Supérieure à Québec, l'intimée prétend que ce testament est nul, parce qu'il n'est pas revêtu des formes prévues par la loi, parce que le testateur n'était pas compos mentis au moment où il l'a signé, ou qu'à tout événement il l'aurait signé sous l'empire de l'erreur, croyant exécuter un autre document. Évidemment, si ce testament est nul, l'intimée, unique fille du testateur, hérite de la totalité de la succession par suite des dispositions de l'article 625 C.C. Mais l'intimée allègue subsidiairement que si le testament du 22 avril 1947 est valide, elle hérite tout de même de son père, en vertu d'un second testament olographe, fait le 29 avril 1947, l'instituant légataire universelle, et révoquant le premier. Ce testament d'après elle, et que quelques témoins ont vu, aurait été perdu, et elle a tenté d'en faire la preuve secondaire.

L'honorable Juge Gibsone a rejeté ces prétentions. Il en est arrivé à la conclusion que toutes les formalités requises pour la validité du premier testament ont été remplies, que Langlais connaissait la nature de l'acte juridique qu'il avait posé le 22 avril 1947, et qu'il y a lieu de présumer qu'il a détruit le second, rendant caduque la révocation qui y était contenue. La Cour d'Appel (1) a renversé ce jugement. Elle en est arrivée à la conclusion que le testateur était sain d'esprit, mais qu'il a signé le premier testament sous le coup d'une double émotion causée à la fois par la mort très récente de sa sœur, et par le fait d'avoir revu sa fille, la demanderesse, après

(1) Q.R. [1950] K.B. 819.

trente-cinq ans de séparation. La Cour est d'opinion que Langlais ne se serait pas rendu compte qu'il aurait signé un testament, mais qu'il aurait cru signer un autre document, et que par conséquent, ce qu'il a signé n'a pas reçu l'adhésion libre d'une volonté éclairée. En arrivant à cette conclusion, la Cour d'Appel évidemment n'a pas eu à se prononcer sur la légalité de la preuve offerte pour l'admissibilité du second testament, car en annulant le premier, elle instituait l'intimée héritière ab intestat.

Il importe en premier lieu de se demander si le premier testament a été revêtu des formes que la loi requiert. L'article concernant les formalités dont doivent être entourés les testaments faits suivant la forme dérivée de la Loi d'Angleterre, est le suivant:—

851. Le testament suivant la forme dérivée de la loi d'Angleterre (soit qu'il affecte les biens meubles ou les immeubles) doit être rédigé par écrit et signé, à la fin, de son nom ou de sa marque par le testateur, ou par une autre personne pour lui en sa présence et d'après sa direction expresse (laquelle signature est alors ou ensuite reconnue par le testateur comme apposée à son testament alors produit, devant au moins deux témoins idoines présents en même temps et qui attestent et signent de suite le testament en présence et à la requisition du testateur.)

(Les règles qui concernent la capacité des témoins sont les mêmes que pour le testament en forme authentique.)

Il n'y a pas de doute que ces formalités sont impératives. L'article 855 ne prête à aucune confusion:—

855. Les formalités auxquelles les testaments sont assujettis par les dispositions de la présente section doivent être observées à peine de nullité, à moins d'une exception à ce sujet.

Ces formalités ont-elles été suivies? Le Mis-en-cause Gérard Bornais a préparé le testament, et le soir du 22 avril, il est venu chez le testateur et lui en a donné lecture, en présence des deux témoins spécialement requis, garde Ouellet et M. René Lachance, comptable. Immédiatement après, en présence des deux témoins, le testateur qui venait d'affirmer que le tout était conforme à ses désirs, signa son testament, et garde Ouellet et M. Lachance y apposèrent ensuite leur signature. C'est la prétention de l'intimée que deux formalités essentielles n'ont pas été suivies. En premier lieu, le testateur n'aurait pas reconnu le testament ni sa signature comme ayant été apposée en présence des deux témoins; et deuxièmement, le testateur

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n'aurait pas personnellement requis les témoins d'attester et de signer le testament. Je ne crois pas que ces deux objections soient fondées.

Pour les maintenir, il faudrait que cette Cour mette de côté le jugement rendu en 1921 dans *Wynne* v. *Wynne* (1). Dans cette cause, le testateur instituait sa femme sa légataire universelle dans un testament fait suivant la forme dérivée de la loi d'Angleterre. Quand le testament lui fut présenté, il le signa sans parler à aucun des deux témoins présents, et n'a pas reconnu sa signature comme ayant été apposée par lui, et il n'y eut pas de demande formelle aux témoins de signer. Le testament a cependant été reconnu valide. La Cour en est venue à la conclusion que comme les deux témoins avaient vu le testateur signer, il était inutile que ce dernier reconnaisse de nouveau sa signature. De plus, comme l'explique M. le Juge Mignault, aucun mandat exprès n'est requis pour obtenir la présence des témoins. Si quelqu'un les fait venir à sa connaissance, comme dans le cas qui nous occupe, les prescriptions de la loi sont remplies. Dans la présente cause, d'après la preuve, il appert que les deux témoins ont été requis par Bornais de signer en présence de Langlais qui a donné sa complète adhésion.

La cause de *Gingras* v. *Gingras* (2) est bien différente. Il s'agissait là d'un testament fait suivant la forme dérivée de la loi d'Angleterre. L'article 851 exige que la signature du testament soit reconnue par le testateur comme apposée à son testament, et cette connaissance doit avoir lieu devant au moins *deux témoins* compétents, *qui sont présents en même temps,* et qui signent ensuite en présence et à la réquisition du testateur. Gingras avait signé en premier son testament devant un témoin, et plus tard, un second témoin qui n'avait jamais vu Gingras signer, y apposa sa signature. Il est clair que tel n'est pas le cas qui se présente dans la cause sous considération. Je suis donc d'avis que les formalités requises ont été suivies, et que ce premier point soulevé par l'intimée doit être rejeté.

En second lieu, quelle était la capacité mentale du testateur? "Tout majeur *sain d'esprit* et capable d'aliéner ses biens, peut en disposer librement par testament", dit l'article 831 C.C.

(1) (1921) 62 Can. S.C.R. 74.

(2) [1948] S.C.R. 339.

Il est d'abord important de noter que dans son témoignage, le mis-en-cause M. Gérard Bornais, avocat de Québec, nous raconte dans quelles circonstances ce testament a été fait. Il nous dit d'abord qu'il connaissait très bien Marie-Anna Langlais parce qu'il y a au delà de 25 ans, elle lui avait avancé l'argent nécessaire à la poursuite de ses études, et que depuis ce temps, il a été en relation assez étroite avec la famille, et qu'il a toujours été heureux, en reconnaissance de ce qui s'était passé, de rendre à mademoiselle Langlais tous les services qu'elle lui demandait. Il allait de temps en temps prendre le dîner, et à la mort de madame Thivierge, dont le testament nommait Firmin Langlais et Marie-Anna Langlais légataires universels, ces derniers lui ont demandé de les représenter pour le règlement de la succession. Tous deux ont signé une procuration en faveur de M. Bornais, mais dont il n'avait pas encore eu l'occasion de se servir à la date de l'instruction de la cause.

Comme Bornais parlait un soir avec Firmin Langlais de la succession de madame Thivierge, Langlais, qui venait d'hériter d'un substantiel montant quelques jours auparavant, dit à Bornais qu'il n'avait pas fait de testament. Bornais a alors suggéré à Langlais de voir le notaire Sirois qui, depuis longtemps, était le notaire de la famille Langlais, mais Langlais a refusé, et a demandé à Bornais s'il était capable de lui en rédiger un. Bornais a expliqué alors qu'il y avait trois sortes de testaments, et on semble avoir convenu d'adopter celui qui serait fait suivant la forme dérivée de la loi d'Angleterre. Sur une question de Bornais, Langlais a exprimé le désir qu'il voulait laisser tous ses biens à sa soeur Marie-Anna Langlais, et que Bornais, déjà porteur d'une procuration pour le règlement de la succession de madame Thivierge, soit exécuteur testamentaire. Bornais est alors reparti, a consulté les notaires Turgeon et Labrecque sur la rédaction du testament, et est revenu vers huit heures le soir du 22 avril à la maison de madame Thivierge où Langlais demeurait. Là, dans le salon, en présence du testateur, de Marie-Anna Langlais, l'appelante, et deux témoins spécialement requis, garde Blandine Ouellet qui avait été au service de madame Thivierge pendant douze ans, et un M. Lachance qui était venu aider à cette dernière à préparer son rapport d'impôt

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sur le revenu. Bornais a lu le testament. Langlais a signé le premier, et ensuite les deux témoins. Avant et après la lecture du testament, toujours en présence des témoins, mais avant que les signatures ne soient apposées, les explications les plus claires, les plus précises, ont été données à Langlais. Je laisse de côté pour le moment les témoignages de Bornais qui a rédigé le testament, et celui de l'appelante qui est bénéficiaire, pour rappeler seulement ceux de deux témoins indépendants, garde Ouellet et René Lachance. La première explique que lorsque les témoins ont été rendus dans la chambre, M. Bornais leur a dit: "M. Langlais vient de faire son testament, si vous voulez signer comme témoins." Il a ajouté: "Je vais vous le lire." "M. Bornais s'est levé, il a lu le testament, bien distinctement à haute voix; quand il eut fini de le lire, il a demandé à M. Langlais s'il voulait signer; il s'est retourné vers moi, il m'a demandé de signer; puis il a demandé à M. René Lachance s'il voulait signer."

René Lachance, l'autre témoin, est encore plus spécifique. Il dit que Bornais a expliqué que Langlais l'avait requis de préparer un testament, et a demandé aux deux témoins s'ils avaient objection à signer en cette qualité. Bornais a alors dit à Langlais: "Un testament ça ne fait pas mourir" "c'est une précaution." Puis il a ajouté: "Vous allez écouter attentivement, je vais lire votre testament." En présence de tout le monde, Bornais a alors lu le testament, et a dit en s'adressant à Langlais: "S'il y avait quelque chose; si ça rencontrait ses désirs, ses idées, si c'était bien ce qu'il voulait;" et enfin que "ceci ne l'obligeait en rien, et que s'il voulait faire un autre testament, qu'il était parfaitement libre d'annuler celui-là, et d'en faire un autre en n'importe quel temps." Toujours d'après Lachance, Langlais aurait dit que c'était "all right."

Bornais confirme ces témoignages. Voici ce qu'il dit: "J'ai dit que monsieur Langlais m'avait demandé de préparer un projet de testament, qu'il donnait ses biens à mademoiselle Langlais, que je l'avais préparé;—j'ai dit: "Il va falloir deux témoins. Si vous n'avez pas d'objection à l'être, je vais lire le testament." On n'est pas obligé de le lire; là, j'ai lu le testament. J'ai demandé à monieur Langlais si c'était bien ses volontés, s'il y avait autre chose à ajouter; il m'a dit: "non." J'ai demandé à monsieur

Langlais s'il voulait mettre sa signature au bas du testament; ensuite, j'ai lu la formule, à gauche, aux témoins, les témoins ont apposé leur signature eux autres mêmes."

Quand les témoins ont été partis, Bornais est resté seul avec Langlais pour quelques instants, et Langlais a confié à Bornais la garde de son testament. Après, ils sont allés dans la salle à dîner où un verre de vin a été offert. Langlais s'est informé de la famille de Bornais, de ses enfants, et a parlé de ses projets d'avenir, durant une demi-heure ou trois quarts d'heure.

Langlais savait-il à ce moment qu'il faisait un testament? Je n'en puis douter un seul instant, et je crois qu'il comprenait parfaitement la portée de l'acte juridique qu'il posait. La preuve révèle que Firmin Langlais, malgré son âge quelque peu avancé, avait la jouissance complète de ses facultés intellectuelles, et qu'il savait à la date du 22 avril 1947, qu'il disposait de ses biens en faveur de sa soeur Marie-Anna Langlais.

En premier lieu, Marie-Anna Langlais nous dit que son frère était bien lucide; et d'après Bornais, Langlais était "un garçon d'affaire, un garçon intelligent." Le docteur Georges-Henri Larue, psychiatre de Québec, appelé auprès de M. Langlais vers la fin du mois d'avril 1947, avant qu'il n'entreprenne un voyage à Lancaster dans la Pennsylvanie, jure que Langlais lui paraissait en état de s'occuper de ses affaires, et que sa mémoire semblait bien fidèle au moment où il l'a vu. "Il n'a pas pu mettre en évidence des signes d'affaiblissement intellectuel." Le Docteur dit: "Il a répondu très bien aux questions," et à la question qui lui est demandée si lui, le Docteur Larue, aurait été justifiable de donner un certificat recommandant l'interdiction de Langlais, il répond dans la négative. Il dit enfin: "Au point de vue d'affaiblissement intellectuel, de baisse de jugement, de l'orientation, j'ai constaté absolument rien."

Le Docteur Gustave Ferland, médecin de Beauport, a soigné Langlais alors que celui-ci était à la maison de pension de Du Fargy dans le cours de l'année 1948, et a constaté que M. Langlais était un individu à peu près normal pour son âge au point de vue mental. Le Docteur Reid, médecin de madame Thivierge pendant de nombreuses années, a rencontré Langlais à maintes reprises depuis 1926, mais c'est surtout en 1947 qu'il l'a vu. Il

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causait avec lui très souvent et témoigne que Langlais répondait bien aux questions, qu'il causait bien. Il a vu Langlais au moment de la mort de madame Thivierge, soit le ou vers le 15 avril 1947, quelques jours avant qu'il ne signe son testament. "Il répondait bien—dit-il—souvent avec beaucoup d'esprit, d'à propos." Il jure ceci: "Je n'ai pas trouvé que c'était un homme aliéné du tout, il savait ce qu'il voulait, et le faisait. Quelquefois, il avait de petites absences de mémoire, mais il m'a fait l'effet d'un homme qui pouvait suivre une idée, y penser longtemps, et revenir le lendemain sur la même chose."

Langlais voyait personnellement à ses affaires de banque, vaquait à ses propres occupations. Il se promenait souvent en automobile, et le chauffeur qui le conduisait affirme qu'il parlait très bien. Vers la fin d'avril 1947, quelques jours après avoir fait le testament en question, il s'est rendu en automobile à Lancaster avec Bornais, le Docteur Reid et le fils de ce dernier, pour y chercher les effets qu'il y avait laissés. Malgré qu'il fût un peu soupçonneux du Docteur Reid, rien ne démontre aucune faiblesse intellectuelle qui puisse laisser croire qu'il n'était pas en possession de toutes ses facultés. Quelque temps plus tard, il s'est même rendu jusqu'aux Trois-Pistoles en automobile, en compagnie de quelques amis.

Si j'ai relaté ces faits, peut-être trop longuement, ce n'est pas tant pour établir la sanité d'esprit de Langlais, que reconnaissent d'ailleurs et la Cour Supérieure et la Cour d'Appel, que pour démontrer que je ne puis admettre, étant donné toutes ces circonstances, la possibilité qu'il ait été induit en erreur, et qu'il ait cru en signant ce testament, signer un document qui n'était pas l'expression de ses dernières volontés. L'émotion causée par la mort de sa soeur et par le retour de sa fille Eléanora, aurait tellement embrouillé et obscurci son esprit, dit-on, qu'il aurait perdu la faculté de discernement et toute sa liberté d'action. Quatre faits sont invoqués au soutien de cette prétention. Garde Ouellet raconte en effet qu'environ vingt minutes après qu'il eut signé son testament, Langlais est monté dans sa chambre, et elle lui a dit: "Savez-vous ce que vous venez de signer M. Langlais?" Sur sa réponse affirmative, la garde a dit: "Qu'est-ce que c'est?" Il a répondu: "C'est des formules pour Ti-Noir." Ti-Noir

était un surnom donné à madame Thivierge. La garde a alors dit: "C'est votre testament que vous venez de signer." La garde ajoute qu'il a fait quelques pas en arrière, et qu'il s'est mis à rire, et est parti. Le second incident se serait produit le 29 avril 1947, au presbytère St-Roch, sept jours après qu'il eût fait son testament. En cette occasion, il aurait, à la suggestion de l'abbé Brochu, décidé de faire un testament olographe, et aurait affirmé qu'il n'avait pas de testament. Au bureau du notaire Lavery Sirois en automne 1947, ce dernier lui a suggéré de faire un testament, et Langlais n'a pas répondu. Et lors d'une seconde visite, plus tard, en octobre 1948, il a dit qu'il avait un testament, "et que ses biens allaient à sa fille madame Phillips." Enfin, il aurait dit à l'intimée dans le cours du mois d'août 1947, "on m'a joué un sale tour, on m'a fait signer quelque chose, et moi je pensais que c'était pour des billets et de l'argent américain pour aller à Lancaster;" et il aurait ajouté: "Après cela, j'ai fait un autre testament, où j'ai révoqué cette espèce de papier; je t'ai mise dans le chemin une fois, je ne veux pas le faire deux fois."

Avec respect, je ne vois rien dans ces déclarations qui ait la force probante voulue, pour me permettre de conclure que Langlais n'a pas volontairement et librement signé son testament. Le testament est un acte solonnel de libre disposition de ses biens pour prendre effet à cause de mort. C'est le privilège inviolable du testateur de choisir ses héritiers, de leur donner la totalité ou partie de ses biens, et c'est aussi son droit de modifier ou révoquer à volonté ses dispositions testamentaires. Toutes sortes de raisons, que seul le testateur connaît, dont il est le juge unique, peuvent l'induire à agir dans un sens ou dans l'autre. Il n'est pas tenu de rien révéler à personne; c'est un secret qu'il garde pour lui.

Il est assez facile, je pense, d'expliquer ces réponses données à garde Ouellet, à l'abbé Brochu, au notaire Sirois et à l'intimée, et de les concilier avec la signature librement apposée à son testament. La preuve démontre qu'après avoir hérité d'une somme de $100,000.00 de sa soeur madame Thivierge, Langlais qui jusqu'à là était sans le sou, est devenu méfiant, que quand on lui parlait d'argent, il détournait la conversation, qu'il n'aimait pas qu'on le questionne sur ses affaires personnelles, et garde Ouellet dit

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aussi que vis-à-vis elle, il ne montrait pas de dispositions bienveillantes et que parfois, "il était plus ou moins poli envers elle." Ce sentiment qui animait Langlais à ne pas parler de questions financières personnelles, de la disposition qu'il avait faite de ses biens, se rencontre chez bien des hommes qui, avec raison, veulent garder ces choses pour eux, et craignent souvent en les révélant, de provoquer des conflits familiaux toujours désagréables.

Est-il surprenant que Langlais ait dit à garde Ouellet d'une façon polie, de se mêler de ses affaires, et qu'il soit parti en souriant, immédiatement après, sans continuer la conversation? Peut-on le blâmer de ne pas avoir révélé à l'abbé Brochu l'existence d'un testament antérieur, dans lequel il donnait tout à sa soeur et rien à sa fille, et faire naître ainsi des discussions auxquelles il ne tenait pas? Son refus en automne 1947, de répondre au notaire Sirois, qui lui demande s'il a un testament, alors qu'il en a deux, confirme bien l'existence de cette répugnance qu'il professe à parler de ces choses personnelles. Ce qu'il a dit à l'intimée est une simple tentative de cacher le fait qu'il l'avait un jour déshéritée. Toutes ces contradictions sont autant d'excuses qu'il cherche pour voiler l'acte qu'il a posé et qu'il regrette. Dans les circonstances difficiles où il se trouvait, on s'explique aisément cette absence de logique. Qu'il n'ait pas dit la vérité, que d'ailleurs il n'était pas obligé de dire, qu'il ait eu des réticences qu'il avait le droit d'avoir, ceci ne signifie nullement que quand il a signé son premier testament, alors qu'il était sain d'esprit de l'aveu de tous, l'émotion, dont personne alors ne s'est aperçu, avait tellement obscurci son intelligence et affaibli sa volonté, qu'il croyait signer un document qui n'était pas son testament. Il aurait fallu qu'il fût en proie à une émotion bien vive et bien profonde pour qu'il ne réalisât pas ce qu'il faisait, quand il demande lui-même à Bornais le 19 avril de lui préparer un testament, quand il le signe trois jours plus tard devant quatre personnes présentes, après que les explications les plus complètes lui sont fournies, au cours desquelles le mot *"testament"* revient à plusieurs reprises, et quand l'on sait qu'après avoir signé, il confie la garde du document à Bornais, en lui disant: "Vous pouvez le garder." Encore, si ce document eut comporté quelque difficulté, mais il était d'une simplicité,

d'une clarté qu'un enfant eut pu comprendre sans effort. Comme l'a dit le Juge Idington dans la cause de *Wynne* v. *Wynne* (*supra*) à la page 78:—

> Moreover there was such a simplicity in the words used in question herein that all that which needed to be understood by him signing was so susceptible of comprehension at the slightest glance that, if any consciousness at all were left, they must have been understood by any one capable of executing the document as undoubtedly the deceased was.

Dans la cause de *Craig* v. *Lamoureux* (1), le Conseil Privé a confirmé la validité d'un testament, dans des circonstances beaucoup plus douteuses que celles qui se présentent dans la cause actuelle. Je crois donc que le testament du 22 avril 1947 a été signé par Langlais avec plein consentement de sa volonté, et qu'il doit être tenu pour valide, comme l'a décidé le juge au procès. Il faut des raisons bien graves pour mettre de côté les dernières volontés d'un testateur.

Langlais entretenait des relations cordiales avec sa sœur Marie-Anna. Celle-ci, après la mort de madame Thivierge, était sa seule sœur, et sa plus proche parente, à part sa fille Eléanora, l'intimée, qui avait quitté sa famille, et n'avait pas revu son père depuis au delà de trente-cinq ans. Il ne me paraît pas étonnant que lors de l'ouverture du testament de madame Thivierge, le 15 avril 1947, Langlais subitement devenu riche, et âgé de 80, eut songé à faire son testament, et à instituer Marie-Anna Langlais, son unique héritière. L'intimée ne voyait ni madame Thivierge, ni Marie-Anna Langlais, ni son père. Dans les réunions de famille on n'en parlait jamais, et même Bornais, le mis-en-cause, ami des Langlais depuis vingt-cinq ans, ignorait son existence.

Mais, après la mort de madame Thivierge, au retour de l'intimée, venue à Québec pour assister aux funérailles, il ne fait pas de doute que Langlais commence à entretenir pour sa fille des sentiments différents. D'abord, à la veille des funérailles, il la voit quelques minutes dans le salon mortuaire, et plus tard, une seconde fois au début de mai, à l'Hôtel St-Roch, où elle se retirait. Poussé par un sentiment d'affection paternelle, il se réconcillie avec elle, et après avoir fait un premier testament, le 22 avril, instituant l'appelante sa légataire universelle, alors qu'on lui dit "qu'un testament peut toujours être révoqué", il se

(1) [1920] A.C. 349.

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ravise, et avant de partir pour Lancaster, il demande conseil à l'abbé Brochu. Le 29 avril, en présence de ce dernier, il écrit et signe un testament olographe qui, d'après l'abbé Brochu, se lisait substantiellement ainsi:—

Je révoque tous autres testaments que l'on aurait pu jusqu'ici me faire signer dans un moment de fatigue ou de lassitude et je lègue tous les biens que je délaisserai à mon décès, à ma fille Eléanora Langlais.

Il est impossible de douter de l'existence de ce second testament dont la garde a été confiée à l'abbé Brochu, qui l'a déposé dans un coffret de sûreté, au presbytère de St-Roch, jusqu'en juin 1948. D'ailleurs, en mai 1947, l'abbé Brochu, en présence du testateur, en a donné lecture à l'intimée. Plus tard, Langlais a affirmé à plusieurs personnes qui le rapportent, qu'après sa mort, tous ses biens iraient à sa fille. Dans le mois de janvier 1948, il lui donne $25,000.00 et en mars de la même année, $5,000.00, soit un total de $30,000.00. L'intimée lui en demande davantage, mais Langlais dit qu'elle n'aurait plus rien. Dans le cours du mois de juin 1948, Langlais va au presbytère, reprend son testament disant à l'abbé Brochu qu'il voulait y apporter des modifications, et à la fin de septembre 1948, après avoir affirmé au notaire Sirois qu'il avait un testament, il lui dit qu'il reviendrait le voir pour le faire modifier. Le notaire Sirois n'a jamais revu Langlais subséquemment, et après cette date, personne ne sait ce qu'est advenu du testament. Après la mort de Langlais en novembre 1948, il n'a pas été retrouvé.

C'est la prétention de l'intimée qu'elle peut en faire la preuve secondaire. La loi permet en certains cas, de faire la preuve orale de documents perdus ou détruits, et cette règle s'applique en France et dans la province de Québec. Les textes varient cependant quelque peu. En France, le seul article qui puisse autoriser cette preuve secondaire est l'article 1348, paragraphe (4) du Code Napoléon. Il se lit ainsi:—

Art. 1348. Elles reçoivent encore exception toutes les fois qu'il n'a pas été possible au créancier de se procurer une preuve littérale de l'obligation qui a été contractée envers lui.

Cette seconde exception s'applique:

.....

.....

4°. Au cas où le créancier a perdu le titre qui lui servait de preuve littérale, par suite d'un cas fortuit, imprévu et résultant d'une force majeure.

Il est admis par la jurisprudence et les auteurs français que cet article est applicable aux testaments aussi bien qu'à tout autre titre. (Vide Demolombe, Vol. 21, page 29; Laurent, Vol. 13, page 112; Dalloz, Nouveau Code Civil annoté, Vol. 3, art. 1348, No. 191).

L'on voit à la lecture de ce paragraphe (4), que ce n'est pas dans tous les cas que l'on peut faire légalement la preuve du contenu d'un testament perdu. Il faut que le testament ait été perdu, par suite d'un *cas fortuit,* imprévu et résultant d'une *force majeure.* Il n'est pas suffisant que celui qui réclame un bénéfice en vertu d'un prétendu testament, dise qu'il est perdu, que des recherches ont été faites, et qu'il demeure introuvable. Ce serait mettre de côté les termes précis de l'article 1348. Les auteurs sont tous unanimes, et en France aujourd'hui pour qu'il soit permis de faire la preuve orale d'un testament perdu, il faut prouver l'existence de l'acte, *le fait,* indépendant de la volonté du testateur, et ignoré de lui, *qui en a causé la destruction,* la teneur du testament et sa date précise. (Dalloz, Nouveau Répertoire, Vol. 4, verbo "Testaments", page 499).

Voici ce que disait Pothier (Oeuvres de Pothier, Ed. Bugnet, page 435):—

> Si celui qui demande à être reçu à la preuve testimoniale, allègue seulement qu'il a perdu ses titres, sans qu'il y ait aucun fait *de force majeure constaté,* par lequel il les ait perdus, il ne peut être reçu à la preuve testimoniale que ces titres ont existé; autrement l'ordonnance, qui défend la preuve par témoins, pour prévenir la subornation des témoins, deviendrait illusoire; car il ne serait pas plus difficile à quelqu'un qui voudrait faire la preuve par témoins de quelque prêt ou de quelque paiement qu'il n'aurait pas fait, de suborner des témoins, qui diraient qu'ils ont vu entre ses mains des obligations ou des quittances, comme d'en suborner qui diraient qu'ils ont vu compter l'argent.

Demolombe s'exprime dans le même sens (Vol. 30, No 201):—

> il faut que le demandeur fournisse la preuve: 1° *du cas fortuit qu'il allègue*; 2° de l'existence antérieure du titre instrumentaire de la convention ou du fait juridique contesté, et de la perte de ce titre par suite du cas fortuit; 3° de la convention elle-même ou du fait juridique sur lequel il fonde sa demande.

Et le même auteur (Vol. 21, page 29, Donations entre vifs et Testaments) dit:—

> Ce que l'on demande à prouver en effet ce n'est pas un testament verbal; tout au contraire! C'est un testament écrit qui a été fait avec toute la solennité prescrite; et l'article 1348 C.C. ne fait que consacrer cette règle générale de bon sens et d'équité.

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Seulement, bien entendu, il faudra, *dans ce cas, prouver d'abord l'événement précis et déterminé de force majeure,* par suite duquel le testament aurait été détruit.

Et ensuite, il faudra prouver non seulement que le testament a existé et quel en était le contenu, mais encore qu'il a existé avec toute la solennité requise et que des témoins, suffisamment en état d'apprécier sa régularité, l'ont vu et lu sans y remarquer aucun vice.

Laurent est aussi explicite: (Droit Civil, Vol. 13, page 112):—

Si nous admettons avec la Cour de Cassation que l'article 1348, No. 4, est applicable aux actes de dernière volonté, c'est qu'il ne fait qu'appliquer un principe général de droit; on peut et on doit l'étendre par analogie à la perte d'un testament. La loi donne sa sanction aux actes juridiques qui se font en vertu de ces dispositions; c'est un principe élémentaire. Or le testateur, on le suppose, a fait un testament dans les formes voulues par la loi; donc sa volonté doit recevoir son exécution. On oppose au légataire qu'il ne produit par le testament; il répond en prouvant que le testament a existé *et qu'il a été détruit par un événement de force majeure.*

Aubry et Rau (Droit Civil, Vol. 7, 4ème Ed., page 10) expriment les vues suivantes:—

Bien que le testament soit un acte solennel, rien n'empêche qu'en cas de perte d'un testament par suite d'un événement resté inconnu au testateur, ou de sa suppression par un autre individu que ce dernier, les personnes au profit desquelles il renfermait des dispositions, ne puissent en poursuivre l'exécution, ou réclamer, le cas échéant, les dommages-intérêts, en prouvant, d'une part, *le fait de la suppression du testament ou de sa perte par suite d'un accident de force majeure,* d'autre part, le contenu de cet acte, et même, en principe, sa complète régularité.

Baudry-Lacantinerie partagent les mêmes vues (Droit Civil, Vol. 2, 4ème Ed., page 375):—

Même si un testament régulier dans la forme *a été détruit par cas fortuit,* la preuve de l'existence du testament, de son contenu et de sa régularité, pourra être faite par témoins.

Dalloz (Code Annoté, Nouveau Code Civil, Vol. 3, sous-article 1348, No. 191):—

191.—L'article 1348, No. 4, qui admet la preuve testimoniale de l'existence de titres perdus ou détruits par cas fortuit ou de force majeure, est applicable au testament aussi bien qu'à tout autre titre.

192.—Dès lors, celui qui se prévaut de dispositions de dernière volonté faites en sa faveur dans un testament *qui a été détruit par cas fortuit ou de force majeure,* est recevable à établir par témoins l'existence du testament, sa teneur, sa validité et *le fait accidentel* par suite duquel sa destruction est survenue.

Enfin, Planiol et Ripert (Droit Civil, Vol. 5, page 544) écrivent:—

Les dispositions dernières d'une personne décédée peuvent cependant être prouvées par témoins lorsque le testament a existé *et qu'il a péri fortuitement.* Cette solution ne contrarie en rien l'exigence de la loi

relativement à l'emploi de l'écriture pour la confection d'un testament. Le prétendu légataire doit prouver l'existence d'un testament, son contenu, *sa destruction par cas fortuit* ou fait d'un tiers, l'ignorance de ce fait par le testateur, et la persistance de la volonté du testateur.

Dans la province de Québec, sur ce point, deux articles doivent retenir notre attention. Ce sont 860 et 1233 (6) C.C. Ils se lisent ainsi:—

860. Lorsque la minute ou l'original d'un testament ont été perdus ou détruits par cas fortuit, après le décès du testateur, ou sont détenus sans collusion par la partie adverse ou par un tiers, la preuve de ce testament peut être faite en la manière réglée pour le cas quant aux autres actes et écrits au titre *Des obligations.*

Si le testament a été détruit ou perdu avant le décès du testateur et qu'il n'ait pas connu le fait, la preuve peut également s'en faire comme si l'accident n'était arrivé qu'après son décès.

Si le testateur a connu la destruction ou la perte du testament et s'il n'y a pas suppléé, il est censé l'avoir révoqué, à moins d'une manifestation postérieure de la volonté d'en maintenir les dispositions.

1233. La preuve testimoniale est admise:

6. Dans les cas où la preuve écrite a été perdue par cas imprévu, ou se trouve en la possession de la partie adverse, ou d'un tiers, sans collusion de la part de la partie réclamante, et ne peut être produite.

L'article 860 qui traite de la preuve secondaire des testaments perdus ou détruits, ne correspond à aucun article du *Code Napoléon.* En France, pour les fins de preuve secondaire, on place les testaments et les autres écrits sur un pied d'égalité, tandis qu'ici, on semble exiger davantage pour établir l'existence d'un testament perdu, que pour prouver tout autre écrit. En effet, lorsqu'il s'agit de testaments, le Code parle de "perdus ou détruits par *cas fortuit*", et il se contente de *"cas imprévu"* pour les autres documents. C'est en s'appuyant sur cette distinction que l'intimée prétend que l'article 860 C.C. ne s'applique qu'à la *vérification* des testaments, et que lorsque l'on veut, au cours d'une instance judiciaire, faire la preuve secondaire d'un testament perdu, il faut avoir recours à l'article 1233 (6). On trouve la réponse à cette prétention dans Mignault (Vol. 4, page 315) et dans Langelier (Vol. 3, page 145). Les deux auteurs affirment le contraire, et signalent que pour la vérification des testaments, c'est l'article 861 C.C. qui trouve son application, et que pour la preuve secondaire d'un testament au cours d'un procès, c'est 860 C.C. qui s'applique. C'est aussi ce que disent les codificateurs dans leur cinquième rapport, article 116, page 178.

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S'il faut donc être guidé par l'article 860 C.C., il faut que celui qui invoque le testament, dont il veut établir la preuve secondaire, démontre qu'il a été perdu ou détruit par *"cas fortuit"*, tel que l'exige l'article. Et c'est sur celui qui allègue ce *cas fortuit* que repose le fardeau de le prouver. (C.C. art. 1200; *Deschenes* v. *C.P.R.* (1); *Lemieux* v. *Ruel* (2)). Il a été soumis à l'argument que les mots "cas fortuit" ne s'appliquent qu'à la destruction du testament, et non à sa perte, et qu'en conséquence, la preuve secondaire doit être admise, parce qu'en prouvant qu'il n'a pas été trouvé, il doit être présumé perdu. Je ne puis admettre cette prétention, et je croix que les mots "cas fortuit" se rapportent et à la perte ou à la destruction du testament. Cette distinction n'a jamais été faite nulle part, et si l'on réfère à l'article 892 C.C., l'on verra que là le *Code* interpose les mots et parle "de la destruction ou de la perte par cas fortuit." J'éprouve de la difficulté à voir pourquoi les mots "cas fortuit" ne s'appliqueraient qu'à la destruction du testament dans l'article 860 C.C., et seulement à sa perte dans l'article 892 C.C. Je ne m'explique pas davantage pourquoi le législateur exigerait, en vertu de l'article 1233 (6), la preuve *"de la perte par cas imprévu"*, lorsqu'il s'agit d'un document ordinaire, et simplement la preuve de la "perte" lorsqu'il s'agit d'un testament qui pourtant est un acte solennel.

En droit anglais la règle est moins sévère. Elle est exprimée ainsi dans Greenleaf "On Evidence", (15ème Ed., Vol. 1, section 558):—

> If the instrument is lost, the party is required to give some evidence that such a paper once existed though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after which, his own affidavit is admissible to the fact of its loss. The same rule prevails where the instrument is destroyed. What degree of diligence for the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the Court and not by the jury. But it seems that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him.

(1) Q.R. 47 S.C. 431.

(2) Q.R. 45 S.C. 393.

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Chez-nous c'est pratiquement la règle du droit français qui s'applique, et celui qui prétend qu'un testament est perdu ou détruit, doit établir non seulement qu'il a fait les recherches raisonnables pour le trouver, mais le *fait précis* comme conséquence duquel il a été *fortuitement* perdu ou détruit. C'est alors seulement qu'il pourra en faire la preuve secondaire. Discutant les dispositions du paragraphe 6 de l'article 1233 du *Code Civil,* qui pourtant paraît moins sévère que l'article 860 C.C., la Cour de Revision qui avait à juger de l'admissibilité de la preuve orale d'un contrat, a cependant décidé dans *Masson* v. *Fournier* (1) que:—

> La partie qui exerce un recours fondé sur un acte sous seing privé est tenue de le produire avec exploit d'assignation. Elle n'est pas admise à en faire la preuve testimoniale sur sa simple déclaration qu'elle l'a perdu. Pour bénéficier du paragraphe 6 de l'article 1233 C.C. il faut établir, non seulement l'existence du titre perdu, *mais encore le cas imprévu qui a causé sa perte.*

Qu'est-il arrivé du second testament de Langlais? Nous n'en savons rien. L'intimée s'est contentée de démontrer qu'elle ne peut pas le produire, et qu'elle a fait des recherches pour le trouver. Sans vouloir entrer dans le champ des hypothèses et des spéculations, il est permis de penser que le testateur a pu le détruire délibérément avec intention de le révoquer; qu'il a été détruit par cas fortuit avec sa connaissance, sans qu'il y ait suppléé, ce qui équivaut à révocation (C.C. 892); qu'il l'ait perdu, et que le sachant, il n'en a pas fait d'autre (C.C. 860). Autant de possibilités qui sont du domaine de l'imagination. Mais dans tout le dossier il n'y a rien qui puisse nous mettre même sur un piste éloignée, d'un *fait précis* de perte ou de destruction par *cas fortuit.* (Demolombe, 30, p. 194, n° 201; Dalloz, Répertoire Pratique, 9, vo. Preuve, p. 465, No. 1261 et autorités; Idem, Jurisprudence Générale, Nouveau C.C., 3, sous art. 1348, p. 513, No. 192; Idem, 2, p. 565, No. 120 et autorités; Juris-Classeur Civil art. 1348, No. 84 et s. et autorités; Larombière, 6 p. 579, No. 40, p. 582, No. 42; *Bienvenue & al.* v. *Lacaille* (2); *Desruisseaux* v. *Poulin* (3)).

Aucune présomption de droit ou de faits ne peut nous aider à arriver à une conclusion. On ne peut pas plus supposer la destruction ou la perte du testament par cas

(1) Q.R. 38 S.C. 242. (2) Q.R. 17 K.B. 464.
(3) Q.R. [1946] S.C. 107.

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fortuit, sa destruction par un tiers avec ou sans la connaissance du testateur, la perte par ce dernier du document contenant l'expression de ses dernières volontés, ou sa destruction volontaire avec intention de révocation. Les conjectures ne sont pas permises, et il faut un fait précis, prouvé, qui permette la preuve secondaire. En droit anglais, Jarman "On Wills" enseigne que si un testament n'est pas retrouvé à la mort du testateur, et qu'il était en possession de ce dernier, il existe une présomption qu'il l'a détruit avec intention de le révoquer, mais je ne crois pas que cette présomption soit reconnue dans le droit de Québec.

La seule présomption admise dans la province de Québec n'est pas une présomption de "destruction volontaire" du testament, quand il ne peut être retracé. La présomption qui existe est que la "destruction" *une fois prouvée,* doit être attribuée au testateur s'il était en possession, ou à un tiers, si c'est ce dernier qui avait la garde du testament. Mais, la destruction, la lacération ou la rature, doivent être préalablement établies, et c'est ensuite seulement que joue la présomption pour aider à déterminer qui en est l'auteur. (Mignault, Vol. 4, page 420; Langelier, Vol. 3, page 190; Planiol, Vol. 3, 4ème édition, page 665; Colin et Capitant, Vol. 3, 2ème édition, page 904). Rien de tel ne se rencontre dans la présente cause. La preuve révèle seulement qu'on ne sait pas ce qui est advenu de ce testament.

Dans ces conditions, je suis d'opinion que ce second testament ne peut être considéré comme légalement prouvé, et qu'il ne contient pas l'expression des dernières volontés de Langlais. Le rôle des tribunaux n'est pas de sanctionner un testament nuncupatif, cette forme orale de tester autrefois reconnue chez les Romains de l'antiquité.

Mais, prétend encore l'intimée, si ce testament n'est pas légalement prouvé, et si on doit le mettre de côté comme tel, il contient toujours une clause de révocation qui subsiste (C.C. 892(2)) et qui a été prouvée suivant les dispositions de 1233(6) C.C. Le premier testament serait alors révoqué, et comme nous serions vis-à-vis une succession ab intestat, l'intimée serait la seule héritière. Pour admettre cette prétention, il faudrait concéder que le testament est divisible, et que l'héritier qui ne peut légalement le prouver, peut tout de même en retenir une partie qui

révoquerait un testament antérieur. La doctrine ne permet pas une semblable division. Le testateur en effet n'a pas fait deux dispositions différentes, un testament nouveau, et une révocation qui puisse être considérée séparément.

Le *Code Napoléon* n'a pas d'article correspondant au second paragraphe de notre article 895 C.C. Cependant, les auteurs sont tous d'opinion que la révocation contenue dans un testament nul par défaut de forme est nulle. Demolombe (Vol. 22, No. 155, page 123, Donations entre vifs) dit ce qui suit:—

Il n'y a pas dans ce testament deux parties distinctes et indépendantes l'une de l'autre; il n'y a qu'un tout indivisible. Le testateur n'a pas fait deux sortes de dispositions différentes, savoir: 1°. Un testament nouveau; 2°. une révocation qui puisse être considérée séparément per se comme formant aussi l'objet principal de l'acte. L'objet principal de l'acte, ou plutôt son unique objet, c'est un testament nouveau renfermant des dispositions nouvelles. Et la clause de révocation n'en est *qu'une de dépendance accessoire,* clause le plus souvent banale et de style, qui s'y trouve intimement subordonnée.

Et par suite, en droit, il est impossible d'appliquer ici la maxime: utile per inutile non vitiatur; car cette maxime est applicable qu'autant que les diverses clauses du même acte n'ont entre elles de liaison intime et que l'une n'est pas la condition ou même seulement la conséquence de l'autre. C'est qu'en effet on ne pourrait pas scinder cet acte unique sans s'exposer à méconnaître l'intention du testateur, qui n'a pas fait une révocation pure et simple, mais qui, voulant seulement remplacer un testament antérieur par un autre testament, a pu subordonner la révocation du premier à la validité du second.

Expliquant l'article 1037 C.N. qui valide la révocation faite dans un testament postérieur resté sans exécution par l'incapacité de l'héritier ou par son refus de recueillir, Demolombe ajoute: (page 125):

Quant à l'argument, que l'on a déruit de l'article 1037, il suffit, pour y répondre, de remarquer que la différence, qui en résulte, a toujours existé! En Droit romain, et dans notre ancien Droit français, la révocation d'un testament antérieur, par un testament postérieur valable, avait son effet, lors même que ce dernier testament demeurait sans exécution par l'incapacité ou le refus de l'héritier institué ou du légataire; tandis que la révocation ne résultait pas d'un testament nul en la forme (comp. les 2 et 7, *Inst. Quib. mod. testam. infirm.*; Ricard, *loc. supra*; Furgole, chap. IX, n° 40); c'est que, en effet, l'inexécution du testament postérieur valable ne lui enlève pas sa force probante; à la différence du testament nul, qui, n'existant pas aux yeux de la loi, ne saurait prouver ni les dispositions nouvelles, ni la révocation!

Laurent, "Principes de Droit Civil", Vol. 14, No. 188, à la page 202, exprime la même opinion:—

On ne peut donc pas diviser la volonté et dire: le testateur est censé n'avoir pas voulu tester, puisque le testament est nul, mais il est censé

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avoir voulu révoquer, puisque l'acte révocatoire est valable. Il faut dire: le testateur a voulu tout ensemble tester et révoquer, l'acte par lequel il a manifesté sa volonté est nul, donc il est censé n'avoir rien voulu. ni tester ni révoquer. Ce que nous disons de la volonté s'applique naturellement à l'écrit, qui est l'expression de la volonté. Si la volonté est indivisible, l'écrit l'est aussi.

Aubry et Rau, "Droit Civil Français", Vol. 11, page 511, s'expriment ainsi:—

> La clause de révocation n'est valable qu'autant que l'acte qui la contient réunit les formes particulières que cet acte requiert d'après sa nature. Il en résulte que, si un acte dressé en la forme des testaments par acte public contenait, non seulement révocation de dispositions antérieures, mais encore des dispositions nouvelles, la nullité de cet acte pour vice de forme par exemple, pour incapacité de l'un des témoins, entraînerait la nullité de la révocation, tout aussi bien que celle des dispositions nouvelles; et cela, quand bien même cet acte réunirait d'ailleurs toutes les formalités exigées pour les actes notariés.

Il est vrai que ces expressions d'opinion se rapportent aux cas de testaments nuls pour défaut de forme, mais l'on voit pour les raisons données que la règle qui régit ces cas doit également s'appliquer à une clause de révocation dans un testament dont l'existence n'est pas légalement prouvée. Qu'il s'agisse en effet d'un testament nul pour défaut de forme, ou d'un testament qui n'est pas légalement prouvé, le principe est le même; et vu que ni l'un ni l'autre de ces documents n'a de force probante, la clause de révocation ne peut avoir d'effets. Il en est différemment ici comme en France, de la révocation d'un testament faite dans un testament postérieur qui reste sans exécution, par suite de l'incapacité du légataire, ou son refus de recueillir (895 C.C.). Dans ce dernier cas, le testament est *valide* et par conséquent la clause de révocation aussi, et la succession échoit à un autre. Il faut donc conclure que si une clause de révocation dans un testament nul pour défaut de forme est nulle, il s'ensuit logiquement, et par analogie, qu'une clause de révocation dans un testament non prouvé est également nulle. Les deux testaments sont inexistants.

Je suis donc d'opinion que ce second prétendu testament de Langlais est indivisible, et que s'il est vrai que l'on peut révoquer un testament par un testament postérieur, ou par un autre acte par écrit par lequel le changement de volonté est expressément constaté, il est également vrai, comme dans le cas qui nous occupe, qu'un testament postérieur qui contient une révocation et de nouvelles dispositions, ne peut pas être divisé, et que si la disposition

n'est pas prouvée, à cause de la nullité de la forme de l'acte ou de l'absence de preuve légale, la révocation qui est l'accessoire tombe également. Qui en effet peut dire que le testateur aurait révoqué le premier testament, s'il n'avait pas eu en vue de faire de nouvelles dispositions testamentaires?

Admettre le principe qu'un testament puisse ainsi être divisé serait enlever tout sens à l'article 895 C.C. qui veut que la révocation contenue dans un testament nul pour défaut de forme est nulle. Il serait étrange de dire en effet qu'une clause de révocation dans un testament nul est inexistante, et que cependant une semblable clause dans un testament non légalement prouvé est valide. Enfin, même s'il fallait admettre la théorie de la divisibilité des testaments perdus, et s'il était permis comme le suggère l'intimée, de ne considérer qu'une clause isolée de révocation, je suis loin d'être certain dans le présent cas, que la perte du document qui révoque a été le résultat d'un "cas imprévu", tel que l'exige 1233 (6) C.C.

De plus, en vertu des dispositions de l'article 892 du *Code Civil,* les testaments peuvent être révoqués par un testament postérieur qui les révoque expressément ou par la nature de ses dispositions. Dans le cas qui nous occupe, l'intimée prétend que le premier testament a été révoqué par un second testament qui contient une clause expresse de révocation. Ce serait contredire les termes précis de l'article 756 du *Code Civil,* qui dit qu'un testament ne peut avoir effet qu'après le décès du testateur, que de soutenir que la clause de révocation qui y est contenue, a pris effet au moment où elle a été écrite, et qu'elle aurait ainsi révoqué le premier testament, *eo instanti.*

Aucun jugement n'a jamais sanctionné cette prétention, et aucun auteur n'a enseigné cette doctrine. Un testament est indivisible. On ne peut donner effet à aucune de ses clauses durant la vie du testateur. Comme le dit Langelier (Cour de Droit Civil, Vol. 3, page 8):—

> Il résulte de là que, tant que le testateur vit, le testament reste dépourvu de tout effet.

Pour appuyer la thèse de la divisibilité du testament, on invoque l'article 896 C.C., qui dit qu'à défaut de dispositions expresses, c'est par les circonstances et les indices de l'intention du testateur, qu'il est décidé si la révocation du

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testament qui en révoque un autre, est destinée à faire revivre un testament antérieur. Il s'ensuivrait que dans le cas de destruction volontaire d'un testament par un testateur, (ce qui en vertu de 892(3) C.C. est une cause de révocation), il serait permis de considérer isolément une clause de révocation d'un testament antérieur, et de lui donner effet au moment où elle a été écrite.

Je ne puis admettre cette prétention. En France, la destruction volontaire par le testateur n'est pas reconnue par le Code comme un mode de révocation, mais les auteurs et la jurisprudence l'ont toujours admise, et lui ont donné effet, parce que, dit-on, c'est tellement évident, qu'il n'était pas nécessaire de le consigner dans le texte de l'article 1035 du *Code Napoléon.* De plus, le Code Français n'a pas d'article correspondant à notre article 896. Cependant, cet article n'est pas de droit nouveau, et quand ils l'ont incorporé dans notre *Code,* les codificateurs ne faisaient que s'inspirer de la doctrine française. (2 Bourjon, 390; Troplong, Donations, 2065). Vide également (*Dupuis et al* v. *Dupuis* (1).

Il faut donc conclure qu'en matière de révocation des testaments, notre loi est pratiquement semblable à la loi française, et que pour en préciser le sens et la portée, on peut s'inspirer des commentateurs français. Or en France, un testament détruit volontairement par le testateur est inexistant. Il faut le considérer comme n'ayant jamais été écrit, et on ne peut donner effet à aucune de ses clauses. (Ripert, Traité de Droit Civil, 4ème Ed., Vol. 3, p. 665; Planiol et Ripert, Traité Pratique de Droit Civil Français, Vol. 5, p. 765; Colin et Capitant, Vol. 3, Droit Civil Français, p. 904; Pandectes Françaises, Donations et Testaments, Vol. 26, p. 303; Aubry et Rau, Droit Civil Français, Vol. 10, p. 457; Demolombe, Cours de Droit Civil, Vol. 18, p. 28; Laurent, Principes de Droit Civil, Vol. 11, p. 130).

Le testament en effet est une disposition à cause de mort, un acte *de dernière volonté.* Durant toute la vie de son auteur, il n'est qu'un simple projet qu'il peut modifier ou détruire à son gré. Seule la mort du testateur transforme

(1) Q.R. 14 L.C.J. 242.

ce projet en disposition. Ceci doit nécessairement s'appliquer à toutes les clauses de l'écrit. (Baudry-Lacantinerie, Droit Civil, Vol. 2, page 250).

C'est évidemment pour cela que Troplong, (Droit Civil, Donations et Testaments, Vol. 3, page 565) enseigne que la reconnaissance d'une dette dans un testament ne serait pas un titre du vivant du testateur, car un testament ne produit d'effet qu'après la mort, et que Merlin (Rép. de Jurisprudence, Vol. 34, page 216) a écrit que celui au profit duquel a été consignée dans un testament, la reconnaissance d'une dette, est sans action, après la révocation de ce testament, pour exiger sa prétendue créance. (Vide également Toullier, Droit Civil Français, Vol. 5, page 588). Si tel est le cas, comme je le crois, il s'ensuivrait qu'un testament est indivisible de sa nature, et qu'une clause de révocation dans un testament que détruit son auteur, ne peut avoir plus d'effet juridique que le testament lui-même.

Je crois donc que l'article 896 C.C. ne peut aider à la solution de la présente cause. Cet article ne trouve son application que lorsqu'il s'agit d'interpréter la portée de certaines clauses de révocation contenues dans les testaments existants, ou légalement prouvés, qui produisent leur effet, mais non pas dans un testament délibérément détruit par son auteur, car alors il n'y a plus de testament. C'est ce que semblent dire implicitement les codificateurs dans leur quatrième rapport à la page 184, quand ils notent que l'article 896 C.C. "expose ce qui a rapport à la révocation, quand il y a plus d'un testament."

D'ailleurs, même si cet article pouvait être légalement invoqué, il ne pourrait trouver son application, car ni le testament olographe, ni la clause de révocation ne sont légalement prouvés.

Une dernière observation s'impose. Je n'oublie pas ce qu'a dit le Conseil Privé dans la cause de *Mignault* v. *Malo* (1). Il est vrai que la loi qui a introduit dans la province de Québec le testament fait suivant la forme dérivée des lois anglaises, a également, d'après le Conseil Privé, introduit les incidents qui s'y rattachent, mais même si ce jugement rendu sur des faits antérieurs à la promulgation du *Code,* doit encore nous guider, ce dont je doute fort, (Vide 2613 C.C.) je ne crois pas que l'on puisse considérer

(1) (1872) L.R. 4 P.C. 123.

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comme incident d'un testament anglais, la preuve d'un testament olographe ou notarié ou d'une clause de révocation qui y est contenue. Le mot "incident" tel qu'employé par le Conseil Privé n'a pas cette étendue qu'on prétend lui donner. Il ne doit comprendre que les accessoires du testament *lui-même,* et non pas les clauses ni la preuve de ces clauses dans un testament postérieur olographe ou notarié, qui doivent être prouvées suivant les dispositions du *Code Civil* de la province de Québec.

Pour toutes ces raisons, je crois que l'appel doit être maintenu avec dépens de toutes les cours, et le jugement de la Cour Supérieure rétabli.

RAND J.: I find it unnecessary to pass upon the question of competency or of mistake as to the nature of the document signed and duress was not argued. I shall deal only with the question of the effect of the holographic will upon the prior will.

Upon the death of a person, a document executed by him is either a will or it is not and either it is then in physical existence or it is not: if it does exist but cannot be found, we say that it is or has been lost. In its primary meaning "lost" signifies that the whereabouts of the document are or have become unknown relatively to a person interested in its custody: the notion in law is referred ordinarily to the present time when the document is sought to be used as a fact of legal significance. The initial and general question is not whether, during the life of the testator and unknown to him, it had been or became lost: he might have placed it in what he thought a safe place which to his successors is an undiscoverable place, and as to them it is lost: as to him and them also, the document might, unknown to both, be in the possession of third persons, and so far lost. On the other hand, if the document is not physically in existence, its destruction may have been due to accident or mishap known or unknown to the testator; or to his own intentional act or to another person's act known or unknown to him.

All those possibilities are envisaged by the language, as I read it, of art. 860. That article deals with the case of a document claimed to be the last will of a deceased

person which for various reasons cannot be produced before the Court. It is as follows:—

When the minute or the original of a will has been lost or destroyed by a fortuitous event, after the death of the testator, or has been withheld without collusion, by an adversary or by a third party, the will may be proved in the manner provided in such case for other acts and writings in the title Of Obligations. If the will have been destroyed or lost before the death of the testator, without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death. If the testator knew of the destruction or loss of the will and did not provide for such destruction or loss, he is held to have revoked it, unless he subsequently manifests his intention of maintaining its provisions.

That a document has been "lost or destroyed by a fortuitous" event must, I think, extend to every case of loss or destruction of which the testator remains unaware. If destruction has been effected by a third person and is unknown to the testator, it must be taken to be within the article for otherwise there would be the absurdity that a retention by a third person would open the way to oral proof of the contents but that his act of destruction during that detention would not: that act would, therefore, be a "cas fortuit." Where an act of the other person causing or the event of accidental loss or destruction was or has become known to the testator, it is seen to be deemed to be the act of the testator and prima facie a revocation.

"Lost" can have a more extended meaning to include destruction as in the expression "lost his life" and art. 1233 would appear to bear the broader signification.

What art. 860 in part does, then, is to declare that where it can be shown that through an unknown accident or mishap or the unknown act of a third person a will has been lost or destroyed before the death, its contents can be proved by oral testimony for the purpose of establishing its provisions as testamentary dispositions. When the destruction is by an act from which the presumption of revocation arises, the article has no application.

In the latter case art. 896 comes into play. It reads:—

In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether, upon the revocation of a will which revokes another will, the former will revives.

The condition of its application is the revocation of a testament by any means permitted by the *Code*. Art. 892 expressly provides for revocation by destruction. When,

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therefore, such a revocation is shown, art. 896, to prevent its purpose from being defeated, necessarily implies that the revocation by the destroyed will of a previous will may likewise be proved by parol evidence.

The effect of these two articles, 860 and 896, is, then, that if, on the death of a testator, a testamentary document shown to have previously existed cannot be found, the actual circumstances causing that undiscoverability lie necessarily within one of them, and that a common minimum proof in both cases is provided for. If those circumstances here are within 860, the entire contents of the holograph will can be proved for all testamentary purposes; and if within 896, likewise the fact that the lost instrument revokes absolutely the previous will. Proof of the fact of revocation is thus seen to arise under both articles; and because the case is necessarily within one of them, that fact may, in any event, be so established. It may be that the express preliminary proof required for each article prevents the case from being brought specifically within either; but what can be shown is that, so far, an unqualified revocation of the first will was effected at the moment of the making of the second; and that there is nothing in the circumstances from which an intention to revive the first could be drawn. In that situation the original will remains revoked, and the second document remains unprovable as a testamentary instrument until the actual circumstances of its loss or destruction can be established.

In the meantime, there is no testamentary disposition standing in the way of the heir. Should either document later appear in proof as a will, the case would be the not infrequent one of an initial assumption of fact being later superseded by proof of another actual fact; but in neither case is the initial revocation of the first will in any manner or degree affected. The position of the heir may be said to be provisional, but it is the same as in any case where a will subsequently appears and supersedes action taken on the other assumption.

This result, apart from the question of revivor, is that reached under the English law by the use of a presumption of fact that if a document is traced to the possession of the testator and at his death cannot be found, it is presumed, in the absence of evidence to the contrary, to have

been destroyed by him animo revocandi. If that were applied here, art. 896 would likewise open the way to proof that the second will revoked the first.

I would therefore dismiss the appeal with costs.

KELLOCK J.:—I agree with my brother Taschereau that the requirements of Article 851 of the *Civil Code*, as to execution of the first will, were met, and that the ground upon which the Court of Appeal (1) proceeded in setting aside the first will is not sufficiently made out by the evidence. The question remains as to the effect, if any, to be given to the second will.

Subject to the question as to admissibility of the evidence, the making of the second will was established to the satisfaction of the learned trial judge and, by reason of Article 892(1), the first will was thereby revoked, *eo instanti*. This is implicit in Article 896 which provides that evidence may be given to establish whether, upon the revocation of a will which revokes an earlier will, the latter revives.

It is, however, contended for the appellant, upon the basis of Article 860, that, as the second will is not forthcoming and the reason therefor is not known with certainty, proof of its contents is not admissible for any purpose. Before considering this Article, it is, as will subsequently appear, important first to consider Article 1233 (6) which is the general rule dealing with proof by oral evidence. Article 1233(6) reads as follows:—

> 1233. Proof may be made by testimony:
>
> (6) In cases in which the proof in writing has been lost by unforeseen accident, or is in the possession of the adverse party or of a third person without collusion of the party claiming, and cannot be produced.

This paragraph appears in Article 252 of the First Report of the Codifiers, and its antecedents are set out immediately following the Article itself, on p. 127 of the First Volume. Included in these references is para. 815 of Pothier which deals with the admission of oral evidence where the document relied upon is not forthcoming "par cas fortuit et imprévu." The author says that if the person seeking to adduce oral testimony alleges only that he has lost his documents without establishing force majeure, such proof is not admissible because of the possible danger of

(1) Q.R. [1950] K.B. 819.

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perjured evidence. The Codifiers also refer to s. 558 of the American work, Greenleaf on Evidence, which reads, in part, as follows:

> If the instrument is lost, the party is required to give some evidence, that such a paper once existed, though slight evidence is sufficient for this purpose, and that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found, if the nature of the case admits such proof; after which, his own affidavit is admissible to the fact of its loss. The same rule prevails where the instrument is destroyed . . . the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the Court, and not by the Jury. But it seems, that, in general, the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. It should be recollected, that the object of the proof is merely to establish a reasonable presumption of the loss of the instrument; and that this is a preliminary inquiry addressed to the discretion of the Judge. . . . Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence of its contents.

In the language actually used by the Codifiers in the Article,

> has been lost by unforeseen accident,

it is clear, in my opinion, that the standard laid down in Pothier and other authorities to the same effect, was not adopted, but the standard laid down in Greenleaf. While the Codifiers include among the sources of Article 1233, Article 1341 of the *Napoleonic Code*, they do not include Article 1348 (4) which uses the words, "par suite d'un cas fortuit, imprévu et résultant d'une force majeure." At p. 30 of their First Report, the Codifiers say that Article 252 "enumerates the cases in which proof may be made by testimony. They are carefully collated from the authorities cited under the Article, and are believed to shew *all the exceptions introduced by legislation or jurisprudence to the general rule requiring proof by writing.*"

There is, of course, no question but that whatever may have been the intention of the Codifiers, it is the actual language used in the Code which governs, and in my opinion, the words actually used, "lost by unforeseen accident" ("cas imprévu") mean simply loss by chance as opposed to design. Accordingly, where, as in the case at bar, a document has once been proved to have existed but cannot be found after the requisite search called for by the

circumstances, it is permitted by the terms of Article 1233 (6) to prove its contents by secondary evidence. This view has, long since, been accepted by the Court of Appeal of the province.

In *Ball* v. *Rolland* (1), a letter had been an exhibit in a previous action but was not forthcoming at the time of the trial of the action in the case under consideration. Secondary evidence of its contents having been refused in the Superior Court, this decision was set aside on appeal. The court, consisting of Archibald, Mercier and Greenshields, JJ., held that the case came within the provisions of Article 1233 (6). Greenshields J., as he then was, after referring to the view of the learned trial judge that the matter in question was not within para. 1 of the Article, said, at p. 184:

> Our law, under Art. 1233, sub-par. 6, makes no distinction between a writing evidencing a commercial contract and one containing proof of a civil contract. In both cases, and with equal force proof may be made by testimony, providing the foundation is laid, viz.: the loss or *disappearance* of the document . . . If it had not been lost; no proof would be required, and it is for the reason that it is lost, through no fault of the plaintiff, that the law gives him the right to establish, if he can, that the contract did exist, and existed in the very terms alleged.

And at p. 185:

> The circumstances attending its loss or *disappearance* can certainly be made by verbal testimony, it cannot be otherwise, and when this has been made, it follows, as night follows day, that the contents can be proved, and proved by parole testimony.

This decision was affirmed by the Court of Appeal.

A similar view was taken by the Court of Review in *Filiatrault* v. *Feeny* (2). In that case, a deed had disappeared from the office of a notary and, although a search had been made, it could not be found. The court admitted secondary evidence. The reasons for judgment of Archibald J. at p. 17 are pertinent. In part, they are as follows:

> The defendant was, therefore, obliged to attempt secondary proof of the contents of the deed. To this the plaintiff objected on the ground that the mere loss of a document for a reason which cannot be explained, as, for example, through the fault and negligence of the notary, without proof of any occurrence of inevitable accident, does not justify secondary proof. Defendant practically admits that under the jurisprudence founded on the Code Napoléon, this view would be probably supported, but defendant claims that our Code has introduced a change in the position.

(1) (1915) 22 R.L.(N.S.) 178. (2) (1901) 20 S.C. 11.

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After referring to the difference in wording between Article 1348 C.N. and Article 1233 (6), Archibald J. continued at p. 18:

> I am of opinion that when parties go before a notary and make an authentic contract which the law requires the notary to preserve with great care, and by some *inexplicable* circumstance the minute has disappeared without the fault of the parties, this constitutes a cas imprévu, or unforeseen accident sufficient to justify secondary proof.

Accordingly, were Article 1233 (6) to govern the question as to the admissibility of secondary evidence to prove the contents of the will of April 29, 1947, it is clear, in my opinion, that the provisions of the Article authorize such proof. I think, however, that Article 860, being a special provision, is the one which applies where the document sought to be proved is a will, rather than Article 1233 (6). It reads as follows:

> 860. When the minute or the original of a will has been lost or destroyed by a fortuitous event, after the death of the testator, or has been withheld without collusion, by an adversary or by a third party, the will may be proved in the manner provided in such case for other acts and writings in the title Of Obligations.
>
> If the will have been destroyed or lost before the death of the testator, without the fact ever having come to his knowledge, it may be proved in the same manner as if the accident had occurred after his death.
>
> If the testator knew of the destruction or loss of the will and did not provide for such destruction or loss, he is held to have revoked it, unless he subsequently manifests his intention of maintaining its provisions.

Grammatically, the words, "by a fortuitous event," do not necessarily modify the word "lost," but only the word "destroyed." It is contended, however, that they apply to both and that in order that secondary proof may be given of the later will, it must be established that its non-production is due to an event "unforeseen and caused by superior force which it was impossible to resist," which is the meaning given by Article 17 (24) to the words, "fortuitous event" or "cas fortuit," used in Article 860. In my opinion, this contention is not well founded.

It is not difficult to think of a "destruction" of the character described in Article 17 (24), but difficult if not impossible, to imagine a "loss," as distinct from a "destruction," of that character. While, as I have already said, it is the language actually found in the *Code* and not what the Codifiers say in their reports which is to govern, one experiences the more confidence in his opinion as to

the construction of the language used in the Code when one finds that opinion was also apparently the opinion of the Codifiers themselves. In their Fifth Report, Vol. II, p. 179, the Codifiers state with respect to Article 860 that, in the first place,

> it is in accordance with the authorities taken from both sources of law,

i.e. both French and English sources.

As already pointed out in discussing the effect of Article 1233 (6), the requirements laid down by Pothier which must be met before secondary evidence of the contents of non-produced documents may be given, are quite foreign to English law, the rule of that law being as already quoted from Greenleaf. Accordingly, if Article 860 is at all in accordance with "the authorities taken from" English law, it can be so only if the words, "by a fortuitous event," do not apply to the word "lost" as used in that Article.

There is further clear evidence that this was the intention of the Codifiers, as they also state on the same page mentioned above, that Article 860 is in accordance with

> what has been *adopted* concerning acts in general in the title "Of Obligations".

This is a clear reference to the law as adopted in Article 1233 (6), and that law can only be in accordance with Article 860 if the last-mentioned Article is to be read as already indicated. At the end of Article 860 (116 in their draft Code) the Codifiers themselves list Article 252 as well as 236 (1217), 237-a (1218) and 10 (51). The first makes use of the words, "lost by unforeseen accident," the second, "destroyed by fire or other accident or otherwise lost," and the last simply, "lost." These references would be quite meaningless if it were necessary in every case of loss or destruction to establish an event occurring by force majeure before Article 860 is to be satisfied.

A non-produced will is either in existence or it is not. If destroyed, it may have been destroyed (*a*) by the testator himself or by his direction, or (*b*) by some other agency. If (*a*), then Article 892 (3) will apply and the will is to be considered revoked, subject to evidence of the character provided for in Article 896. If (*b*), then Article 860 becomes relevant and the question of revocation appears to depend upon whether or not the testator knew of the

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destruction. If the will is still in existence, it may be in the hands of some third person, or it may have been "lost" in the sense that it is not forthcoming and cannot be found. Article 860 deals with both.

Where one finds, as in Article 860, both words, "lost" and "destroyed," used, I do not know, as I have already said, what significance can be given to the former by attaching to it the words by which Article 17 (24) defines "fortuitous event." A document which has "gone astray" or is "no longer to be found" by reason of an event "caused by superior force which it was impossible to resist," involves a conception which to my mind is self-contradictory. If a document has "gone astray" or "cannot be found," that would appear to exhaust the situation. If one is able to specify the event responsible for the non-production, it seems to me that the document becomes "lost," not in the sense of having gone astray, but as having perished, that is, "destroyed." Accordingly, while the phrase, "lost or destroyed," in Article 860 becomes "destruction or loss" in the reference in Article 892 (3) to Article 860, the change in order involves no change in the meaning which can be given to the words.

At this point, the provisions of Article 861 may also be referred to. That Article provides for probate "in conformity with" Article 860 of "a non-produced will" upon "positive proof both of the facts which justify such a proceeding and of the contents of the will." The Article goes on to provide that in such case, proof of the will will be held to be established "according to the proof deemed sufficient and to whatever modifications may be found in the judgment."

Among the references given by the Codifiers under the Article is Greenleaf, Vol. 11, s. 688 (*a*), which reads as follows:

> If the will is proved to be lost, it may still be admitted to probate, upon secondary evidence, as in the case of lost deeds and other writings. And though, as we have seen, if the will, shown once to have existed, cannot be found after the death of the testator, the presumption is that he destroyed it, animo revocandi, yet this presumption may be rebutted by evidence. But if it be so rebutted, yet the contents of the will cannot be proved, unless by the clearest and most stringent evidence.

To what extent this statement of English law may be considered to have been embodied in the *Code* it is not

necessary to determine in the present case. This much is, however, in my opinion, clear from the terms of Articles 860 and 861 themselves, that both contemplate proof of the contents of a will proved to have been made but which those claiming under it are unable to produce because it is "lost," in the sense already explained.

In my opinion, therefore, the facts as found by the learned trial judge enable the court to say that the proof of the making and contents of the second will establish the revocation of the first will. In the existing state of the record, there is no evidence upon which the court could find that this will remained an effective instrument and was not revoked. In these circumstances, I concur in the view that the deceased died intestate. The appeal should be dismissed with costs.

CARTWRIGHT J.: For the reasons given by my brother Fauteux I agree with him that the Court of Appeal (1) rightly concluded that, when he executed the instrument of the 22nd of April, 1947, the deceased, Langlais, did not realize what he was signing and that his will did not go along with the signing of the document.

At the risk of repetition, it appears to me that no adequate explanation has been offered of the fact that garde Ouellet some minutes after she had signed as a witness to the instrument of April 22, 1947, asked the deceased:— "Savez-vous ce que vous venez de signer là?" The fact of the question being asked at all by this witness who knew that the document just signed purported to be a will is of the utmost significance. She must surely have been prompted to ask it by something in the appearance or manner of Langlais which caused her to believe that he did not realize what he was doing. His reply to her and his subsequent statements to L'Abbé Brochu indicate that such belief was well founded.

While this is sufficient to dispose of the appeal I wish also to deal with another aspect of the matter. As is clearly shown in the reasons of my brother Fauteux, the evidence (always subject to the question of its admissibility) established beyond peradventure that the deceased

(1) Q.R. [1950] K.B. 819.

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did on the 29th of April write out and sign a will in holograph form which expressly revoked the will of the 22nd of April. The learned trial judge had no doubt as to this. He says, in part:—

. . .certainement il l'a révoqué par le testament du 29 avril, pourvu toutefois qu'il laissait subsister la révocation;

He was however of the opinion that the will of the 29th of April had in its turn been revoked and that the result of such revocation was to revive the earlier will of the 22nd of April. He puts the matter as follows:—

. . . mais s'il détruisait le document qui révoquait, il devait savoir que la révocation projetée devenait caduque; le fait de reprendre le document pour le modifier, impliquait qu'il allait détruire le premier, et le remplacer par un autre; s'il n'y avait que des modifications tout en laissant subsister les premières dispositions, il n'avait qu'à ajouter par codicile; du moment qu'il détruisait le premier, il mit fin à tout son contenu, et s'il désirait remettre en vigueur quelque partie de ce qu'il avait détruit, il devait le faire expressément; il n'a pas fait ça, et ne faut-il pas conclure qu'il ne désira pas revivre ce qu'il avait détruit;

Having taken this view it was perhaps unnecessary for the learned trial judge to consider whether the execution of the will of the 29th of April was sufficiently proved by admissible evidence and he does not deal with this expressly but it seems to me to be implicit in his reasons that he regarded the execution of the will of the 29th as properly proved, by which I mean proved by legally admissible evidence. The learned judges of the Court of Appeal, having reached the same conclusion as my brother Fauteux, did not find it necessary to examine this question.

It was, however, argued before us with great force that under the law of Quebec, differing in this respect from the Common Law, it was not permissible to prove that the will of the 29th of April had been executed and contained a clause of revocation. It was urged that the Court must therefore decide the case as if the only evidence before it was that of the execution of the document of the 22nd of April, 1947, and that if on the evidence it were held that at the time of its execution it was the free act of a competent testator it must be admitted to probate.

On this branch of the matter I agree with the conclusion of my brother Rand. The relevant sections of the *Civil Code* when read together and applied to the facts of this case appear to me to indicate that the fact that the will

of the 22nd of April, 1947, if otherwise valid, was effectively revoked by the holograph will of the 29th of April, 1947, may be proved by oral testimony.

I am in agreement with the learned trial judge that the destruction of the will of the 29th of April by the testator *animo revocandi* has been sufficiently proved as a fact by the evidence of L'Abbé Brochu coupled with the proof that after the death of Langlais the will could not be found. If authority is needed to shew that the fact of such destruction may be proved in this manner reference may be made to Laurent, Principes de Droit Civil (1878) Vol. 14, pages 268 to 269:—

> Tandis que la révocation par le destruction de l'acte n'est certes pas un acte solennel, c'est un fait matériel; il s'agit de prouver le fait et, s'il y a lieu, l'intention du testateur. Ici c'est une question de preuve, et par conséquent il faut appliquer le droit commun. Or, il est de principe, comme nous le dirons au titre des Obligations, que les faits matériels se prouvent par témoins, donc par présomptions.

I am unable to agree with the learned trial judge that this revocation had the effect of reviving the earlier will. Whether or not this would be so must be determined under the provisions of section 896 of the *Code* by the circumstances (which I take to mean, all the circumstances of the case) and by the indications of the intention of the testator. I can find no circumstance and no indication of the intention of the testator which suggests that he intended by revoking the second will to revive the first. Indeed, all the evidence that has any bearing on this question seems to me to point clearly to the contrary conclusion.

The fact of destruction *animo revocandi* having been established it is next necessary to consider the effect of the relevant sections of the *Civil Code*. In doing so it is well to bear in mind the provisions of section 12 of the Code:—

> When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed.

and also the elementary rule that construction is to be made of all the relevant parts of the statute together and not of one part only by itself. *"Incivile est nisi tota lege perspecta una aliqua particula ejus proposita judicare vel respondere."* Dig. 1, 3, 24, Corpus Juris Civilis 11th

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Edition, Volume 1, page 34. The result appears to me to be as follows:—

(i) The instrument of the 22nd of April (assuming that it was the free act of a competent testator) was valid under section 842 (3) of the *Civil Code*.

(ii) The instrument of the 29th of April was valid by virtue of section 842 (2).

(iii) The last-mentioned instrument effectively revoked that of the 22nd of April by virtue of section 892 (1).

(iv) The instrument of the 29th of April was in turn effectively revoked by destruction *animo revocandi* by virtue of section 892 (3).

(v) Whether upon the revocation of the will of April 29th the will of April 22nd revived, then fell to be determined under the provisions of section 896 reading as follows:—

> In the absence of express dispositions, the circumstances and the indications of the intention of the testator determine whether upon the revocation of a will which revokes another will, the former will revives.

It appears to me that the effect of holding that the fact of the execution of the second will and the fact that it contained a clause revoking the first cannot be proved by oral testimony would be to nullify the provisions of section 896 in every case in which the second will was either in holograph form or in the form derived from the laws of England and was revoked by destruction *animo revocandi*. To so hold would be to construe section 896 as if there were added to it a clause to the following effect:—

> Provided, however, that if the second will was in holograph form or in the form derived from the laws of England and was revoked by destruction *animo revocandi* then it shall be conclusively presumed that the former will revives.

It appears to me that to adopt such a construction would be to defeat the intention of the legislature expressed in section 896, rather than to fulfil it as section 12 requires us to do. No counterpart of section 896 is found in the *Code Napoléon*. It is a provision of great importance and to give it effect it is necessary that oral proof of the second will should be received whenever it is shown that such document has been destroyed by the testator *animo revocandi*. It is a special provision and if such proof is apparently prohibited by the general provisions of section

1233 then such general provisions must yield; *generalia specialibus non derogant*. It must be remembered that what is to be proved by oral and circumstantial testimony is not a document to which testamentary effect is to be given. *Ex hypothesi* the testamentary effect of the second will has gone because it has been destroyed not "par cas fortuit" or "par cas imprévu" but deliberately and with the intention of revoking it. It appears to me to be implicit in the wording of section 896 that the earlier will is gone *eo instanti* when the later one, which revokes it, is executed, subject only to the possibility of its being revived not merely by the revocation of the later will but by such revocation coupled with circumstances and indications of intention shewing that the testator intended to revive the earlier. To accept the appellant's argument on this point would render section 896 nugatory. It would bring about the result that the earlier will, if still in existence, would *ipso facto* revive on the destruction of the later and the determination of the question which under section 896 is to be made in accordance with the circumstances and indications of the intention of the testator would become a mere matter of chance depending upon the means of revocation of the second will adopted by the testator.

For all of the above reasons I am of opinion that the appeal should be disposed of as proposed in the judgment of my brother Fauteux.

FAUTEUX J.: Appelante et intimée se disputent les biens laissés par Joseph Firmin Langlais à son décès, survenu à Québec, le 27 novembre 1948. La première, sœur du défunt, invoque comme titre à la succession de son frère, un testament fait à Québec, le 22 avril 1947, suivant la forme dérivée de la loi d'Angleterre. La seconde, unique enfant du défunt, soumet d'abord que le testament précité est nul pour défaut de forme et vice de substance et elle invoque sa qualité d'unique héritière légale. Elle plaide subsidiairement que ce premier testament a été, le 29 avril 1947—conséquemment, sept jours après sa confection—révoqué expressément par un testament olographe la constituant héritière. Ce second testament n'a pas été représenté en preuve. Et sa disparition reste inexpliquée. Mais

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la preuve de l'existence de ce testament ne fait aucun doute. C'est l'admissibilité de cette preuve, faite par témoins, qui est sous question.

C'est l'intimée qui a pris l'initiative de l'action en justice pour demander l'annulation du premier testament et la reconnaissance de son titre d'héritière légale.

Cette demande a été rejetée par la Cour Supérieure laquelle, pour le motif que les formalités requises par la loi avaient été suivies, a affirmé la validité du premier testament et, quant au second, a conclu à sa destruction *animo revocandi* et, de ce fait, à la remise en vigueur du premier.

La Cour d'Appel (1) a cassé ce jugement. A l'unanimité, elle en est venue à la conclusion qu'en signant le premier testament, Langlais a cru signer autre chose, et que cet écrit n'a pas reçu "l'adhésion libre d'une volonté éclairée." En conséquence, l'intimée a été déclarée seule héritière légale de Firmin Langlais et les questions relatives au second testament n'ont pas été discutées au jugement de cette Cour.

Devant nous, l'appelante a plaidé la validité du premier testament et l'absence de preuve légale du second.

Sur le testament olographe du 29 avril 1947. Il n'y a aucun doute que Langlais, sept jours à peine après la confection du premier testament, a fait un testament olographe. Le fait est affirmé par l'abbé Brochu; ce testament a été fait en sa présence et, pendant plus d'un an, il en est resté en possession, à la demande de Langlais. Ce testament a été également vu par d'autres personnes et, quelques quinze mois après sa confection, Langlais l'a repris pour le refaire. Plus tard, et après en avoir repris possession, il affirma au notaire Sirois que ses biens allaient à sa fille, l'intimée, qu'il avait fait un testament à cet effet mais qu'il entendait y ajouter des legs particuliers. Tous ces faits sont acceptés comme prouvés par le Juge de première instance, lequel a, de plus, accepté que, suivant ses termes, ce testament révoquait le premier et constituait l'intimée héritière. Mais, concédant d'une part que la disparition de ce testament restait inexpliquée, le Juge de première instance n'en a pas moins conclu qu'il avait été détruit par Langlais *animo revocandi.*

(1) Q.R. [1950] K.B. 819.

Ce testament olographe du 29 avril 1947—le dernier en date—serait, par ses dispositions, décisif du litige, révoquerait le premier testament et constituerait clairement l'intimée seule héritière des biens de Langlais, n'était-ce le jugement qu'il faut rendre sur l'objection faite à l'admissibilité de la preuve orale. En effet, pour lui donner tous les effets juridiques qui lui sont propres, i.e., révoquer le premier testament et déclarer l'intimée héritière testamentaire, il faut d'abord que ce testament olographe ait été légalement prouvé. Et c'est là la seule et véritable question qui se pose sur ce testament. Comme mon collègue, le Juge Taschereau, j'en suis arrivé à la conclusion que les facteurs conditionnant l'admissibilité de la preuve testimoniale faite pour donner effet aux dispositions de ce testament, n'ont pas été prouvés en cette cause et qu'en conséquence, l'intimée ne peut hériter en vertu du testament olographe du 29 avril 1947. De plus, et outre la clause de révocation y contenue, ce document comportant des dispositions expresses de libéralités, je ne puis le diviser pour le traiter comme un simple écrit de révocation au sens du paragraphe 2 de l'article 892.

Sur le premier testament, celui du 22 avril 1947. Le Juge de première instance a conclu à la validité de ce premier testament sur la base des deux considérants suivants:—

> De l'avis de cette Cour, les preuves de l'accomplissement des formalités requises pour le testament du 22 avril 1947 sont tellement précises et certaines qu'elles ne pourraient être mises de côté par cette question et réponse dont parle Mademoiselle Ouellet;
>
> De l'avis de cette Cour, il appert que toutes les formalités requises par la loi étaient remplies et observées dans l'exécution du testament du 22 avril 1947.

L'accomplissement des formalités, établi par des preuves claires et précises—preuves que "la question et réponse dont parle Mademoiselle Ouellet" ne saurait écarter—constitue donc l'unique raison sur laquelle se fonde le jugement affirmant la validité de ce premier testament.

D'autre part, le jugement de la Cour d'Appel (1), cassant celui de première instance, repose sur le motif que cet écrit du 22 avril 1947 "n'a pas reçu l'adhésion libre d'une volonté éclairée et que, partant, il doit être annulé."

Ces deux considérants du jugement de première instance suggèrent les observations suivantes.

(1) Q.R. [1950] K.B. 819.

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En premier lieu, la preuve de l'accomplissement des formalités d'un acte, solennel ou non, ne saurait, sans un texte précis à cet effet—et il n'en existe pas en l'espèce—équivaloir à une présomption *juris et de jure* de sa validité. Autrement, ce serait couvrir par des formalités, l'erreur, l'absence de volonté, la fraude, . . . autant de causes qui vicient dans son essence l'apparente adhésion du signataire d'un acte.

Outre l'inaccomplissement des formalités, l'intimée en la présente instance a plaidé, particulièrement au paragraphe 16 de la déclaration, que Langlais n'a pas réalisé ce qu'il signait et qu'il n'a jamais voulu signer un testament dans les termes du document du 22 avril 1947. On a donc invoqué deux faits définitivement subjectifs et, comme tels, susceptibles l'un et l'autre d'être soustraits, non seulement à l'observation des témoins à l'acte, mais également à la conscience de celui qui l'exécutait au moment même où l'acte était signé. Si donc l'un ou l'autre, ou ces deux faits sont prouvés, l'accomplissement le plus parfait des formalités ne saurait autoriser la conclusion de validité. A cet égard, il faut aussi immédiatement observer que la "question et réponse dont parle Mademoiselle Ouellet" est loin d'être le seul élément de preuve à considérer, tel que je me propose de l'indiquer.

Une dernière observation. Celle-ci porte précisément sur le point même de la preuve en pareille matière et est suggérée par les règles suivantes, venant du droit anglais, et applicables, suivant la décision de *Mignault* et *Malo* (1) à l'examen de la validité d'un testament fait dans Québec suivant la forme dérivée de la loi d'Angleterre. Ces règles, formulées par le baron Parke, ont été récemment réaffirmées par le comité judiciaire du Conseil Privé dans *Harmes & others* v. *Hinkson* (2). On le trouve à la page 446:—

> 1°. The *onus probandi* lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and a capable testator and, 2°. if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of a Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased.

(1) (1872) L.R. 4 P.C. 123.

(2) (1945-46) 62 T.L.R. 445.

Sans doute, ce testament avait été vérifié avant l'action mais ceci ne constitue par *res judicata* sur le point. (*Dugas et Amyot* (1)).

Il suffira d'ajouter que les faits, conditionnant le jeu de la règle en second lieu précitée dans *Harmes & others* v. *Hinkson,* ont été allégués et prouvés en la présente cause. A la vérité, ce testament du 22 avril 1947 a été préparé à l'instigation de la personne qui en réclame tout le bénéfice, i.e., l'appelante, par son conseiller personnel, son protégé et son obligé, le mis-en-cause qui en a, d'ailleurs, été constitué exécuteur testamentaire. Et la jurisprudence, réaffirmant en quelque sorte le principe *qui per alium facit per seipsum facere videtur,* affirme que la règle de preuve ci-dessus s'applique également en de telles circonstances.

Autant de questions qui, dans mon humble opinion, affectent fondamentalement la décision de ce litige et qui, je le dis avec déférence, ont échappé à la considération judiciaire en première instance.

Sans qu'il soit nécessaire de relater au long tous les faits établis, il convient donc de considérer les circonstances immédiatement contemporaines à l'exécution de ce testament, soit celles qui l'ont immédiatement précédé, ou suivi, comme celles qui l'ont accompagné.

D'abord, les rapports et relations entre Langlais, l'appelante et l'intimée.

Entre Langlais et l'intimée. L'intimée est la fille de Langlais. Mariée, elle est devenue et reste veuve avec un enfant. Financièrement, elle a peu ou pas de moyens. Elle est son héritière légale et elle et son fils sont ses héritiers naturels. Il est vrai qu'à la suite du décès de sa femme, que, pour des raisons non clairement précisées mais de conséquences non moins pénibles, Langlais fut séparé de son enfant, l'intimée, et, ce, pour une période de trente-cinq ans. Qu'une réconciliation, par voie de correspondance, ait été acquise entre les deux, bien avant la date du décès de Madame Thivierge, le fait est probable. Il est nettement affirmé par l'intimée. Chose certaine, c'est qu'à la première opportunité, subséquente à ce décès, Langlais qui, pendant cette longue séparation, gardait sur sa personne la photographie de sa fille et l'exhibait à ses intimes, lui ouvre ses bras. Dès son arrivée à Québec

(1) [1929] S.C.R. 610.

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pour les funérailles, il l'invite à monter immédiatement à la maison sachant bien, d'autre part, que l'appelante vient à peine d'indiquer à sa fille la volonté de lui refuser l'entrée de la maison.

Entre Langlais et l'appelante. L'appelante est la sœur de Langlais. Elle n'est pas son héritière naturelle, ni légale. Financièrement, c'est une personne en moyens et, ce, avant même le décès de Madame Thivierge. Elle vient, au surplus, elle-même d'hériter d'une fortune considérable.

Rien dans la preuve ne suggère aucune raison invitant Langlais à la constituer son unique héritière et, encore moins, et pour arriver à ce faire, à aller jusqu'à déshériter sa fille, aussi bien que son petit-fils.

Entre l'appelante et l'intimée. Les sentiments de la première à l'endroit de la seconde ne font aucun doute. Ils manifestent d'une hostilité complète et irréductible au point qu'aucun événement, même un décès dans cette famille, aux membres limités—événement qui, généralement et tout naturellement, favorise les réconciliations entre tous les parents—ne saurait faire trêve à cette hostilité. Elle défend même l'entrée de la maison à l'intimée.

Tels sont les rapports et relations entre ces trois personnes au moment où, quatre jours à peine après les funérailles de Madame Thivierge, déjà s'exécute le document du 22 avril 1947, pour assurer la disposition des biens dont Langlais vient d'hériter de cette dernière.

La volonté, aussi bien que l'empressement de l'appelante de mettre la main sur l'héritage de Langlais est manifeste. Dans son esprit, ces biens appartiennent aux Langlais—ce qui, pour elle, élimine l'intimée—et son frère, Firmin Langlais, n'a pas la liberté d'en disposer à son gré.

Langlais n'a pas, lui, à ce temps, la volonté de faire un testament. C'est bien l'appelante qui l'a poussé à faire ce testament. Quant à lui, c'est l'appelante elle-même qui le rapporte, il disait: "Des papiers, je ne veux pas en faire." —"Il le disait, de lui laisser la paix."

Disons, en passant, que, déjà, on avait obtenu de Langlais une procuration en faveur du mis-en-cause et, ce, sous le vain prétexte de régler les affaires de la succession, dont le règlement avait été confié, par le testament de Madame Thivierge, à un M. St-Pierre. Procuration qui,

d'ailleurs, n'a jamais servi, sauf, peut-être, comme en a conclu la Cour d'Appel, qu'à jeter, avec les autres papiers qu'on a fait signer à Langlais, de la confusion dans son esprit.

Par une réponse en son témoignage, le mis-en-cause semble suggérer que l'idée du testament a germé chez Langlais, en affirmant que Langlais s'est informé si l'appelante avait fait un testament. Mais, dans une autre réponse, le même témoin nous dit que c'est lui qui, *"incidemment"* a informé Langlais du fait que l'appelante avait déjà fait son testament.

De toutes façons, le témoignage de l'appelante ne laisse aucun doute que c'est elle qui, nonobstant les dispositions clairement contraires de Langlais, a pressé ce dernier à faire le testament par lequel elle bénéficie.

Sur les instructions données par Langlais au mis-en-cause pour les fins de ce testament. D'après le témoignage de ce dernier, Langlais aurait sans ambages déclaré qu'il laissait tout à l'appelante. Au cours de l'enquête, on a demandé au mis-en-cause pourquoi, à son titre de conseiller, il n'avait pas attiré l'attention de Langlais sur le fait qu'il déshéritait sa fille. A cela, il répond, en substance, que ceci ne le regardait pas et qu'au surplus, il ignorait le fait que Langlais avait une fille et même le fait qu'il avait été marié. La réponse surprend. Le mis-en-cause connaissait Langlais et Madame Thivierge depuis plusieurs années, et l'appelante, depuis vingt-cinq ans. Mais, si tel est le cas et si, au moment de ces instructions données par Langlais au mis-en-cause, ce dernier était encore ignorant du fait que Langlais avait une fille et un petit-fils, ce fait ne pouvait manquer de hanter l'esprit de l'appelante qui s'est bien gardée de le dévoiler au mis-en-cause.

Sur l'exécution du testament. Du récit qu'en font les témoins, on doit conclure que la cérémonie fut très brève. La version qu'ils en donnent démontre que les formalités extérieures de la loi ont été substantiellement suivies. Mais si, comme on l'a prétendu, Langlais avait, quelques jours à peine auparavant, clairement et librement décidé de faire un testament et d'instituer l'appelante sa seule héritière sans, au surplus, aucunement commenter sur le fait qu'il déshéritait ainsi sa fille et son petit-fils, on peut se demander pourquoi, ainsi que le rapporte le témoin,

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René Lachance, le mis-en-cause aurait dit à Langlais avant la lecture du testament: "Un testament, ça ne fait pas mourir." Et on peut se demander également pourquoi, au moment même où, la lecture terminée, on invite Langlais à signer, le mis-en-cause, toujours d'après le même témoin, aurait dit à Langlais "que ceci ne l'obligeait à rien et que, s'il voulait faire un autre testament, il était parfaitement libre d'annuler celui-là et d'en faire un autre en n'importe quel temps."

Pourquoi ces représentations diminuant l'importance des conséquences de cette signature recherchée avec tant d'empressement par l'appelante? Ou bien, ces deux commentaires ont-ils été suggérés au mis-en-cause par des discussions, ou des représentations faites antérieurement et que la preuve ne rapporte pas?

Mais les faits suivants sont prouvés et non contredits, et, en cela, rendent cette cause singulière, car ce sont les actions et les paroles d'un témoin essentiel à la validité de l'acte du 22 avril 1947, garde Ouellet, et du signataire lui-même, Langlais, qui sont rapportées.

Moins de vingt minutes après la signature du testament et dès après avoir quitté l'appelante et le mis-en-cause, Langlais monte à la chambre de garde Ouellet. Cette dernière est en quelque sorte de la famille. Elle en connaît tous les membres et, sans aucun doute, la nature de leurs relations respectives, aussi bien passées qu'actuelles. Elle vivait chez Madame Thivierge depuis douze ans. C'est là que Langlais se retirait durant ses voyages annuels à Québec. Déjà, elle, qui vient d'être témoin à l'exécution du testament, manifeste les appréhensions qu'elle en a apportées et demande à Langlais: "Savez-vous bien ce que vous venez de signer?" Langlais lui-même confirme ses appréhensions par une réponse dont le sens naturel démontre qu'il n'a pas réalisé avoir signé un testament. Il affirme, au contraire, avoir signé un tout autre document.

Quelques jours plus tard, Langlais lui-même encore, et, cette fois, de façon expresse, précise à un autre témoin, l'abbé Brochu, que ce n'est pas un testament qu'il a signé le 22 avril 1947, mais réaffirme qu'il s'agissait d'autres sortes de papiers. Informé par son ami, l'abbé Brochu, que tel n'est pas le cas mais que c'est bien véritablement

un testament qu'il a signé le 22 avril 1947, il en fait immédiatement un autre révoquant le premier, donnant tous ses biens à sa fille, et confie ce document à la garde de l'abbé Brochu, entre les mains duquel il demeure pour une période de plus d'un an.

Sans doute, ce testament olographe n'ayant pas été prouvé légalement, ne peut produire les effets juridiques qui lui sont propres. Rien n'empêche, cependant, mais tout commande, au contraire, qu'il soit tenu compte de tout l'incident comme circonstance qui, en la présente cause, se rattache nécessairement à la considération de la validité du premier.

L'intégrité et la crédibilité de garde Ouellet et de l'abbé Brochu sont avérées. Ni le Juge au procès, ni le dossier n'indiquent aucun motif d'en douter. L'examen minutieux de ces témoignages confirme cette intégrité et cette crédibilité. Et la substance de ce qu'ils rapportent s'harmonise avec le poids de la preuve testimoniale admissible où apparaissent, de façon très prépondérante, l'existence et le maintien d'une volonté chez Langlais bien opposée à celle qui est exprimée au document du 22 avril 1947.

Pour ces raisons, il faut tenir pour avéré que Langlais lui-même a clairement déclaré qu'il ne s'était pas rendu compte qu'il signait un testament en signant le document du 22 avril 1947. C'est la preuve.

En faisant pareille déclaration, Langlais était-il sincère ou a-t-il, dans chacune des circonstances, à l'endroit de garde Ouellet comme à l'endroit de l'abbé Brochu, et comme en faisant ce testament olographe dont il assura la conservation pendant plus d'un an, voulu simuler s'être trompé?

Sauf preuve au contraire, une personne est présumée exprimer sa pensée par ce qu'elle dit et sa volonté véritable par ce qu'elle fait. La simulation ne se présume pas. Elle doit donc être prouvée par celui qui l'invoque. Aussi bien, et sans la preuve des dires et actes de Langlais subséquents à la signature du document du 22 avril 1947, il serait difficile de ne pas tenir cet écrit comme exprimant et la pensée et la volonté de Langlais. Mais en la présente cause, cette

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preuve existe. Et le sens ordinaire et naturel de ces déclarations à garde Ouellet et à l'abbé Brochu, et la portée de l'acte qu'il a posé en faisant le second testament, sept jours à peine après le premier, est qu'il n'a pas compris, et n'a pas voulu faire le premier, celui du 22 avril 1947.

On veut éluder le sens naturel de la réponse de Langlais à garde Ouellet en suggérant que le premier a voulu gentiment faire comprendre à la seconde l'empertinence de sa question. Avec déférence, je dois dire que, dans mon humble opinion, c'est là une conjecture. Si, à ce moment, Langlais avait véritablement la conscience d'avoir signé l'expression libre et voulue de ses dernières volontés, n'était-il pas également naturel pour lui de dissiper dès lors les appréhensions de garde Ouellet, ce témoin essentiel à la sécurité de l'acte solennel qu'il venait, suivant la prétention de l'appelante, à peine et volontairement de signer?

Langlais a-t-il voulu, chez l'abbé Brochu, simuler s'être trompé? Le récit que l'abbé Brochu fait de cette visite ne suggère aucune simulation. Comment se justifier de la présumer? L'abbé Brochu visitait Madame Thivierge de son vivant. Il était visité par Langlais lors des visites de ce dernier à Québec. Il avait la confiance des deux. Rien n'indique que les paroles que Langlais a prononcées dans ces circonstances n'aient pas fidèlement traduit sa pensée. Et il a affirmé qu'il s'était mépris sur la nature du document du 22 avril 1947.

Mais on suggère que Langlais a voulu cacher le fait qu'il avait volontairement déshérité sa fille par ce document. Mais, pourquoi cacher ce fait à l'abbé Brochu? Encore ici, c'est, je crois, une conjecture.

Incidemment, on peut ajouter que l'appelante elle-même, au procès, référant à ce testament du 22 avril 1947, a déclaré qu'il était: "Oui, bien signé, bien arrangé; c'est connu, ça." Déclaration ayant un sens susceptible de parfaitement se réconcilier avec cette autre déclaration de Langlais à sa fille, faite en référence au même document: "On m'a joué un sale tour. . . ."

On peut ajouter la preuve de toute une série de circonstances prouvées et indépendantes de ces déclarations de Langlais et fournissant dans leur ensemble une cause plausible sinon certaine, comme en ont jugé les Juges de

la Cour d'Appel (1), de l'erreur affirmée par Langlais. La preuve ne démontre pas que Langlais souffrait d'aliénation mentale, mais comment peut-on se justifier de l'avoir fait examiner, quelques jours à peine après la signature du premier testament, par un spécialiste en maladies mentales, à moins que dans l'esprit de ceux qui ont provoqué ou concouru à cet examen, Langlais ait pu, par sa conduite, ses agissements ou ses déclarations, donner crainte à ce sujet? Victime d'une hémorragie cérébrale l'automne précédent, fatigué par de récents et longs voyages, atterré par la mort d'une sœur qu'il aimait particulièrement et qui lui témoignait de toutes façons de l'affection, affecté sans aucun doute par le retour de sa seule enfant qu'il n'avait vue depuis trente-cinq ans, autant de circonstances qui, ajoutées au poids de son âge, étaient susceptibles de jeter, à certains moments, quelque confusion dans son esprit.

En somme, je dois conclure que la preuve n'établit pas que Langlais ait simulé, mais indique, par prépondérance, qu'il était sincère quand, dans les quelques minutes, aussi bien que dans les quelques jours après l'exécution du document du 22 avril 1947, il a affirmé n'en avoir pas réalisé la portée, et, comme les membres de la Cour d'Appel, je ne puis dire que cet écrit a reçu l'adhésion libre d'une volonté éclairée.

Je renverrais le présent appel, maintiendrais le jugement de la Cour du Banc du Roi siégeant en appel, et réaffirmerais les conclusions du jugement formel de cette dernière Cour; le tout avec dépens des trois Cours.

Appeal dismissed with costs.

Solicitors for the appellant: *Letarte & Ferland.*

Solicitors for the respondent: *Prévost, Gagné & Flynn.*

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(1) Q.R. [1950] K.B. 819.

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*May 30
*Oct. 2

DONALD M. FINDLAY (DEFENDANT) ....APPELLANT;

AND

MARY FINDLAY (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Husband and Wife—Separation Agreement—Repudiation of payments by husband—Application for maintenance under The Deserted Wives' and Children's Maintenance Act, R.S.O. 1937, c. 211, dismissed as to wife—Effect on action by wife to recover arrears under separation agreement.

Under a separation agreement a husband covenanted to pay a monthly sum for his wife's support and a further sum for the support of their child. After several payments had been made the wife wrote the husband demanding an increase. The husband treated the demand as a repudiation of the agreement and ceased paying. Alleging desertion the wife brought action under *The Deserted Wives' and Children's Maintenance Act.* The claim was dismissed as to the wife but maintained as to the child. The wife then sued to recover the amounts in arrear under the agreement and secured judgment. The husband appealed on the grounds that: the wife had repudiated the agreement and elected for recourse under the Act; was thereby estopped from asserting any claim she might have had under the agreement, and finally that the judgment obtained under the Act was *res judicata.*

Held: (Cartwright J. dissenting). The appeal should be dismissed. The doctrine of election had no application and there was no basis for the defence of estoppel or *res ajudicata.* (Kerwin J. concurred in the finding of the trial judge, affirmed by the Court of Appeal, that the correspondence did not effect a repudiation by the respondent or a termination by mutual agreement of the provisions of the separation agreement.)

Per Rand J. The rights under the agreement and statute are based on different considerations: they remain co-existent but, related to a period of time, the performance of only one can be exacted, and the operation of one and suspension of the other will depend on the circumstances. Election can not be taken as between the statutory right and the agreement as a whole. The purpose of the statute is to give the wife a summary means of compelling the husband to support her: it is not to cut down rights against him which she otherwise possesses. To bring an action under the agreement can not affect the right under the statute.

Per Kellock and Locke JJ. The respondent on the facts of the case, did not have any cause of action under the Act and therefore was not in fact faced with an election at all. Where the parties are living apart by consent when the refusal or neglect occurs, it cannot be said of the wife that she is living apart "because of" such refusal or neglect.

*PRESENT: Kerwin, Rand, Kellock, Locke and Cartwright JJ.

Per Cartwright J., dissenting, The default by the husband in the circumstances amounted in law to a repudiation. The wife had a choice of remedies, to sue on the contract, or to treat it as at an end. If she chose the latter the contract would no longer be in existence. *Lush on Husband and Wife* 4 ed. p. 385. Having sought payment under the statute and not by virtue of the contract, she made her election. *Cooper* v. *C.N.O.R.* 55 O.L.R. 256 at 260; *Scarf* v. *Jardine* 7 App. Cas. 345 at 360.

Decision of the Court of Appeal [1951] 1 D.L.R. 185, affirmed.

APPEAL by a husband from the judgment of the Court of Appeal (1) affirming the judgment of Gale J. (2) in favour of a wife in an action to recover arrears under a separation agreement.

R. M. W. Chitty K.C. for the appellant: The Court of Appeal erred in the following respects (i) the facts show that the respondent unequivocally repudiated the contract and therefore the cause of action disappeared; (ii) having elected the remedy of recourse to the Courts, she elected to rely on her rights under the statute and abandoned the contract; (iii) she is estopped from setting up the contract; (iv) the order of the Family Court is *res judicata.*

The agreement not being in arrears the respondent was precluded from a resort to the *Deserted Wives' and Children's Maintenance Act.* She might have had an action in alimony. *Hyman* v. *Hyman* (3). The appellant could have continued to make payments under the agreement and thus barred the action taken by the respondent under the statute but he chose, as he had the right to do, to accept a repudiation: *Hochster* v. *De la Tour* (4); *Scarf* v. *Jardine* (5); *Cooper* v. *C.N.O.R.* (6); *Toronto Ry. Co.* v. *Hutton* (7); *Bouveur* v. *Bouveur* (8); *Wagner* v. *Wagner* (9); *Wiley* v. *Wiley* (10); *Tulip* v. *Tulip* (11).

The principle of estoppel is essentially involved in the argument already submitted. Election is a branch of estoppel, 13 Hals. 2nd Ed. pp. 454-5.

The information in the Family Court was clearly laid under s. (1) of *The Deserted Wives' and Children's Maintenance Act.* That section permits a deserted wife

(1) [1950] O.W.N. 708; [1951] 1 D.L.R. 185.
(2) [1950] O.W.N. 485.
(3) [1929] A.C. 601.
(4) (1853) 2 E. & B. 678.
(5) (1882) 7 App. Cas. 345 at 360-1.
(6) 55 O.L.R. 256 at 260.
(7) 59 Can. S.C.R. 413.
(8) [1941] 2 D.L.R. 348.
(9) [1940] 4 D.L.R., 848.
(10) (1919) 46 O.L.R. 176.
(11) [1951] 1 All E.R. 563.

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to claim maintenance for herself and children of the marriage living with her. It does not involve any adjudication that the children are "deserted." The magistrate's order purports to dismiss the application as to the wife but orders maintenance for the child living with her. The order as to the child must depend upon a finding that the wife was deserted and the purported dismissal as to the wife can only mean that the wife while "deserted", to give jurisdiction to make the order, is not entitled to maintenance.

There is thus a valid and subsisting order of a Court of competent jurisdiction adjudicating the rights of the parties. The appellant was at no time charged with desertion of his child and so until and unless the information was amended so to charge him the magistrate had no jurisdiction to make an order under s. 2. The order can only have been made under s. 1 and the dismissal as to the wife can only mean that under the circumstances and on the evidence the wife was not entitled to an award of maintenance for herself but only for the child. In *Stevens* v. *Stevens* (1), the Court of Appeal for Ontario held in that case, as McTague J.A. delivering the judgment said, "It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding." His *obiter dictum* does not go far enough but assuming it is an accurate statement of the law, so far as it goes, the respondent here is barred by it from enforcing the agreement because there is an order of the Family Court subsisting that at least suspends the remedy under the separation agreement. The separation agreement is no more severable in this manner than the order of the Family Court.

Moyer v. *Moyer* (2) is clearly distinguishable—there the order of the Family Court had expired and was not a subsisting order. *Smellie* v. *Smellie* (3) is also distinguishable. No question of contractual rights arose. The conflict was between rights under *The Matrimonial Causes Act* and *The Deserted Wives' and Children's Maintenance Act.*

(1) [1940] O.R. 243 at 246. (2) [1945] O.W.N. 46.
(3) [1946] O.W.N. 458.

W. D. S. Morden, for the respondent: There was no evidence adduced to support the allegation that the respondent deserted the appellant. Assuming that she had, such desertion could not affect the validity of the separation agreement entered into more than a month after the alleged desertion.

The separation agreement was not brought about by duress. A contract is voidable at the option of one of the parties if he entered into it under duress, but he must make his choice to deny or affirm the contract within a reasonable time. In this case the appellant acted on the separation agreement for nine months and as a consequence cannot now be heard to complain of circumstances leading up to the making of the agreement. *United Shoe Machinery Co.* v. *Brunet* (1); *Bowlf Grain Co.* v. *Ross* (2); *Abram S.S. Co.* v. *Westville Shipping Co.* (3); *McKinnon* v. *Doran* (4).

The separation agreement was not terminated by mutual consent. Mere negotiation for a variation of the terms of a contract will not amount to a waiver unless the circumstances show that it was the intention of the parties that there should be an absolute abandonment and dissolution of the contract. *Robinson* v. *Page* (5). Where the question is whether one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon the contract and altogether to refuse performance. *Frult* v. *Burr* (6); *General Billposting Co.* v. *Atkinson* (7).

The learned trial judge was right in holding that there is nothing in *The Deserted Wives' and Children's Maintenance Act* which expressly extinguishes the respondent's right of action under the separation agreement. No statute operates to repeal or modify the existing law, whether common or statutory, unless the intention is clearly implied. *Lamontagne* v. *Quebec Ry. L.H. & P. Co.* (8); *Western Cos. Ry. Co.* v. *Windsor & Annapolis Ry.* (9). The

(1) [1909] A.C. 330; 78 L.J.P.C. 101 at 104.
(2) 55 Can. S.C.R. 232.
(3) [1923] A.C. 773; 93 L.J.P.C. 38 at 44.
(4) (1916) 35 O.L.R. 349 at 362, affirmed 53 Can. S.C.R. 609.
(5) (1826) 3 Russ. 114 at 119.
(6) (1874) L.R. 9, C.P. 205; 43 L.J.P.C. 91.
(7) [1909] A.C. 115 at 128.
(8) 50 Can. S.C.R. 423.
(9) (1882) 7 App. Cas. 178.

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respondent retains a right to sue for default under the separation agreement despite the proceedings taken by her in the Family Court. Had that Court made an order in her favour, the provisions in the separation agreement would be suspended as long as the order was outstanding. *Steevens* v. *Steevens* (1); *Moyer* v. *Moyer* (2); *Smellie* v. *Smellie* (3).

Chitty K.C. replied.

KERWIN J.:—This Court granted leave to the defendant, Donald M. Findlay, to appeal from an order of the Court of Appeal for Ontario (4) dismissing an appeal by him from the order of Gale J. which adjudged that the plaintiff, Mary L. Findlay, the wife of the defendant, do recover against him fifty-five dollars with costs on the Division Court scale without set-off, and further ordered that the defendant's counter-claim be dismissed with costs to the plaintiff on the Supreme Court scale. Several of the issues raised before the trial judge and the Court of Appeal were abandoned in this Court, leaving for consideration only the questions designated by counsel for the appellant as repudiation, election, estoppel and *res judicata*.

By an agreement of September 16, 1948, the parties separated and agreed that the husband should have the custody and control of a son of the marriage and that the wife should have the custody and control of a daughter. The husband agreed to pay the wife $30 each month for herself, down to and including the month of January, 1950, after which the monthly payment was to be increased to $40. He also agreed to pay the wife $35 per month for the daughter's maintenance. On May 31 the respondent wrote the appellant a letter to which no reply was made until June 29, and it in turn was answered on July 4. At that time no default had been made in any of the payments under the agreement.

The trial judge considered this correspondence and his conclusion that it did not effect a repudiation by the respondent or a termination by mutual agreement, of the provisions of the separation agreement, was affirmed by

(1) [1940] O.R. 243.
(2) [1945] O.W.N. 463.
(3) [1946] O.W.N. 458.
(4) [1950] O.W.N. 708; [1951] 1 D.L.R. 185.

the Court of Appeal. Without detailing the contents of these letters, it is sufficient to say that having read them and considered the argument on behalf of the appellant, I am in agreement with that conclusion.

The issues as to election, estoppel and *res judicata* may be considered together but it is first necessary to narrate what occurred after the correspondence referred to above. Under *The Deserted Wives' and Children's Maintenance Act*, R.S.O. 1937, c. 211, as amended, an information was laid by the respondent against the appellant charging that he had deserted his wife without having made adequate provision for her maintenance and the maintenance of any of his children residing with her, and that he was able to maintain them in whole or part, and that he wilfully neglected or refused so to do. The record shows that after a plea of not guilty, the order made upon that information was as follows:—

> Dismissed as to wife. Order for $10 per week for support of child, first payment to be made July 26, 1949, at the York County Family Court office.

The appellant was paid the $10 each week for the daughter. On October 12, 1949, the respondent brought an action against the appellant in the First Division Court of the County of York, claiming the sum of $120 as arrears of payments due her under the separation agreement. On the appellant's application this action was transferred into the Supreme Court of Ontario and came on for trial before Gale J. Presumably something had been paid on account of the $120, leaving a balance of $55, for which amount judgment was given.

In *Stevens* v. *Stevens* (1), the wife took proceedings under the *Deserted Wives' and Children's Maintenance Act* and was granted an order for payments which were less in amount than those to which she was entitled under a separation agreement. She then commenced proceedings in the Division Court for a sum representing the difference between the total of the payments due under the separation agreement and those made under the Act. It was held that

(1) [1940] O.R. 243; 3 D.L.R. 283.

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she had alternative and not cumulative remedies, and McTague J.A., in delivering the judgment of the Court of Appeal, states:—

> It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding.

In *Moyer* v. *Moyer* (1), the plaintiff had made an application under the Act and an order was granted directing the husband to pay the wife certain amounts "for a period of six months with the opportunity to either party to speak to this Court" at the expiration of that time. After the expiration of six months within which no further steps were taken in those proceedings, an action was commenced in the Supreme Court of Ontario for alimony, and Hogg J. held, following *Stevens* v. *Stevens,* that her rights were under suspension, but only so long as the order was outstanding. The *Stevens* case was also referred to in *Smellie* v. *Smellie and Murphy* (2). That was a motion in an action for divorce for an order for payment of maintenance for the infant children of the parties. It was held that it was undesirable where the relief asked is within the competence of the lower Court that an order should be made in the Supreme Court of Ontario as long as there is outstanding in the Magistrate's Court an order for the same purpose.

In the meantime, in Saskatchewan, MacDonald J. in *Bouveur* v. *Bouveur* (3), had extended the decision in Stevens and proceeding upon a suggested analogy with decisions under the British and Saskatchewan Workmen's Compensation Acts held that the granting of an order under the Saskatchewan Act and compliance with it by the husband, although the order was subsequently rescinded on the latter's application, estopped the wife from relying upon the provisions of a separation agreement. He referred to the decision of Elwood J. in *Dalrymple* v. *C.P.R.* (4), and the Court of Appeal in *Neale* v. *Electric and Ordnance Accessories Co.* (5). It remains but to add that *Bouveur* v. *Bouveur* was distinguished by the Saskatchewan Court

(1) [1945] O.W.N. 463.
(2) [1946] O.W.N. 458; 3 D.L.R. 672.
(3) [1941] 2 D.L.R. 348; 1 W.W.R. 245.
(4) (1920) 13 S.L.R. 482. 55 D.L.R. 166.
(5) [1906] 2 K.B. 558.

of Appeal in an opinion delivered on its behalf by Mr. Justice MacDonald in *Wagner* v. *Wagner* (1), where it was held that the fact that an action for alimony has been commenced and later discontinued by a wife does not constitute a bar to her subsequent enforcement of her right to the payment of maintenance under *The Deserted Wives' and Children's Maintenance Act,* R.S.S. 1940, c. 234.

On this appeal it is unnecessary to consider a situation such as existed in *Stevens* v. *Stevens.* The suggested analogy with decisions under Workmen's Compensation Acts is not valid as that class of legislation contains special provisions differing in various jurisdictions as to the right to claim compensation if an action be dismissed, and also amendments have from time to time been made conferring a right, in England at any rate, upon the Court of Appeal to fix the compensation or refer the matter back for that purpose if the action and an appeal from its dismissal have been dismissed. I deem it unsafe to apply any decisions under such Acts to circumstances such as here exist.

The doctrine of election, or as it is called in the law of Scotland, the doctrine of "approbation" and "reprobation", depends upon intention: *Spread* v. *Morgan* (2). The doctrine was fully discussed in *Lissenden* v. *C.A.V. Bosch Limited* (3), and particularly in the judgment of Viscount Maugham. He points out it was confined in England and in Scotland to cases arising under wills and deeds and other instruments *inter vivos* until the decision of the Court of Appeal in *Johnson* v. *Newton Fire Extinguisher Co.* (4). That decision and others following it were overruled in Lissenden and it was held that the doctrine could not apply to the right of a litigant to appeal either from a judgment or from an award of a County Court judge made under the British Workmen's Compensation Act, 1925, where the litigant had accepted weekly sums payable under an award, and it was decided that he was not precluded from appealing on the ground that the compensation should have been of a larger sum than that awarded. At page 419, after stating as one of the general propositions not in doubt that no person is taken to have made an

(1) [1949] 4 D.L.R. 848.
(2) (1865) 11 H.L. Cas. 588.
(3) [1940] A.C. 412.
(4) [1914] 2 K.B. 111.

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election until he has had an opportunity of ascertaining his rights and is aware of their nature and extent, Viscount Maugham continues:—"Election in other words, being an equitable doctrine, is a question of intention based on knowledge." At page 429, Lord Atkin states:—"Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one, he cannot afterwards assert the other." Lord Russell of Killowen agreed with Viscount Maugham and Lord Atkin. At page 436, Lord Wright states:—"Even if this were (which it is not) a case of election, there is, furthermore, no evidence of the essential elements of election, namely, the presence of knowledge of the position and intention to elect."

I am unable to perceive upon what grounds it may be said that merely by laying the information the respondent intended to forego any rights she had under the separation agreement. Indeed it is plain that nothing was farther from her mind. The doctrine of election has, therefore, no application. As to estoppel, no step was taken by the appellant in reliance upon any action of the respondent and there is no basis for that defence or the defence of *res judicata* as all that transpired before the magistrate was that the respondent's claim under the Act for maintenance for herself was dismissed. The magistrate had no jurisdiction to enforce the separation agreement although, under subsection 2 of section 1, the existence of such an agreement, providing there has been default thereunder, does not prevent the exercise of jurisdiction to order payments.

The appeal should be dismissed with costs.

RAND J.:—This action was brought by a wife on a separation agreement made in September, 1948, for monthly payments as provided. Several defences were raised: that the contract had been obtained by duress: that a repudiation by the wife had been accepted by the husband: that it had been terminated by agreement: and that the action was barred by reason of certain proceedings brought in the York County Family Court under *The Deserted Wives' and Children's Maintenance Act*. The first three were found against the husband in both courts below and those findings have not been seriously challenged in this Court.

The last presents the substantial point in the appeal. After an exchange of letters in May and June, 1949, on which the defence of repudiation was based, the husband, here the appellant, defaulted in the monthly payments both to the wife for herself and for the maintenance of a young daughter living with her. The wife thereupon laid an information under the Act mentioned both on her own behalf and on behalf of the child, alleging desertion and claiming maintenance. The Family Court, treating the relief sought as severable, dismissed the wife's personal claim on the ground that no evidence of desertion within section 1(2) of the Act, the condition of relief, had been presented; and made an order in favour of the wife for the benefit of the child of $10 a week. By the agreement the sum for the wife was $30 a month and for the daughter, $35. Following the dismissal of the wife's complaint, this action was brought.

The argument is put on several grounds: election, estoppel and *res judicata*; but before dealing with them, it will be desirable to refer to the relevant provisions of the statute.

S. 1(1):—

Where a wife has been deserted by her husband an information may be laid before a justice of the peace and such justice of the peace may issue a summons against the husband in accordance with the form in the Schedule to this Act and if upon the hearing before a magistrate, it appears that the husband has deserted his wife without having made adequate provision for her maintenance and the maintenance of his children residing with her and that he is able to maintain them in whole or in part and neglects or refuses so to do, the magistrate may order him to pay such weekly sum as may be deemed proper, having regard to all the circumstances and such order may be in the form given in the Schedule to this Act.

(2) A married woman shall be deemed to have been deserted within the meaning of this section when she is living apart from her husband because of his acts of cruelty, or of his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able so to do, or of the husband having been guilty of adultery which has not been condoned and which is duly proved, notwithstanding the existence of a separation agreement, providing there has been default thereunder and whether or not the separation agreement contains express provisions excluding the operations of this Act.

Section 2(2):—

A child shall be deemed to have been deserted by his father, within the meaning of this section, when the child is under the age of sixteen years and when the father has, without adequate cause, refused or neglected to supply such child with food or other necessaries when able so to do.

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What is the "default" under p. 1(2) that will open the statutory relief to the wife? If the agreement does not provide for maintenance, is the wife forever barred, providing no default takes place? Assuming default to be in payment of maintenance and that only agreements containing such a provision are within the subsection, the statute is to be taken as creating, as a matter of public policy, a right in the wife to which resort may not be made so long as a provision for maintenance in a separation agreement is being fulfilled.

But it is patent that the right under the agreement and that under the statute are based on different matters and factors: the former could be resisted only by considerations arising out of the agreement: but that under the statute involves desertion and the conditions laid down in s. 1. They are thus separate and distinct in substance, character and remedy. It is not, then, a matter of alternative claims arising out of the same state of facts. The jural conclusion from that situation is this: the rights remain coexistent but, related to a period of time, the performance of only one of them can be exacted; and the operation of one and the suspension of the other will depend on the circumstances. Election could not be taken to be between the statutory right and the agreement as a whole: the latter will in general provide for essential matters which are quite beyond the purview of the statute; and if resort to the statute were to abrogate the provision in the agreement for maintenance, it would effect a basic alteration in the considerations on which the mutual promises were made. It might conceivably lead as well to the defeat of the statutory claim through the removal, by the husband, of the grounds on which it rests. The purpose of the statute is to give to the wife a summary means of compelling the husband to support her: it is not to cut down rights against him which she otherwise possesses. Where such relief is, in the public interest, provided for the protection of the wife, why should it be so interpreted as to create substantial risks in resorting to it? In the presence of such disparate and independent claims, each depending on different facts, a rule that the commencement of proceedings on one is an irrevocable election to be bound by its result, putting both on the issue of one, seems to me to lack a sound legal basis.

Election, moreover, implies a plurality of real rights: if an asserted claim is rejected, it cannot be the matter of election. The order of the Family Court did reject the claim under the statute and there was left only the right, if it existed, under the agreement. Furthermore, to bring action on the agreement would not affect the right under the statute; if that were not so, the husband, by deliberate default, could effectually force the wife to the loss of one or other of the remedies; but the statute cannot be taken to intend as a further condition of its availability, that the wife should abandon her remedy under the agreement, an unsatisfied judgment on which would appear clearly to be such a default as s. 1(2) envisages. As election must operate reciprocally, *a fortiori* the right under the agreement is not lost by a futile resort to the statute.

Nor can I see any possible application of estoppel. In whatever mode it is conceived, as representation of fact, existing or future, or as a mutual assumption of a situation acted upon, it lacks a basis in actuality. The letters between the parties exhibit the defects of the contention; if estoppel could be tortured out of them, that device would become an almost universal determinant of rights.

Finally it is urged that the order by the Family Court is *res judicata*. The issue to be determined there was that of desertion and it was found against the wife: but desertion is no part of the claim under the agreement. And as the order in relation to the child was clearly made under s. 2, this ground is without any substance.

The appeal must be dismissed with costs.

The judgment of Kellock and Locke JJ. was delivered by:

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Ontario affirming a judgment at trial in favour of the respondent in an action brought by her to recover certain past due instalments under a separation agreement between the parties. Under the agreement in question, dated September 16, 1948, the appellant covenanted to pay to the respondent during the joint lives of the parties an "allowance" of $30 per month and to pay for the maintenance of their infant daughter, whose custody

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was to be in the wife, the sum of $35 per month until the child attained the age of 18 years. At the present time, the child is eleven.

The payments called for by the agreement were duly made until and including the month of June, 1949, when, as result of certain correspondence passing between the parties, initiated by the respondent, the appellant refused to make further payments. Thereafter, the respondent commenced proceedings under *The Deserted Wives' and Children's Maintenance Act,* R.S.O. 1937, c. 211. These proceedings were dismissed as to the respondent herself but an order was made against the appellant for the payment of $10 per week for the support of the infant daughter, the payments to be paid into the Family Court of York County.

The appellant contends that the action ought to have been dismissed at the trial on the ground that the respondent, in the correspondence passing between the parties prior to the litigation, had repudiated the separation agreement and that this repudiation was accepted by him. He further contends that, on the basis of election or estoppel, by reason of the proceedings taken by the respondent above referred to, she is no longer entitled to enforce the covenant for payment in the deed of separation.

The statute, by subsection (1) of s. 1, provides that where a husband has deserted his wife without having made adequate provision for her maintenance and the maintenance of his children residing with her, and (that) he is able to maintain them in whole or in part and neglects or refuses so to do, he may be ordered to pay such weekly sum as may be deemed proper, having regard to all the circumstances. It is further provided by subsection (2) that a married woman shall be deemed to have been deserted within the meaning of the section when she is living apart from her husband because of, *inter alia,* his refusal or neglect without cause to supply her with food and other necessaries when able so to do, "notwithstanding the existence of a separation agreement, providing there has been default thereunder, and whether or not the separation agreement contains express provisions excluding the operation of this Act." The words quoted were added by amendment in 1935.

Subsection (1) of s. 2 provides that a father who has deserted his child may be summoned before a magistrate or judge of the Juvenile Court, who, if satisfied that the former has wilfully refused or neglected to maintain the child and has deserted the child, may order the father to pay up to $20 per week for its support, as the magistrate or judge may consider proper, having regard to the means of the father and to any means the child may have for his support. Subsection (2) provides that a child shall be deemed to have been deserted by the father within the meaning of the section when the child is under the age of 16 years and the father has, without adequate cause, refused or neglected to supply such child with food or other necessaries when able so to do.

With respect to the correspondence, I am content to take the view that the respondent was announcing her intention not to be bound by the agreement with respect to the amount thereby provided for and, if necessary, of instituting proceedings to obtain increased maintenance. What the basis of this demand was the correspondence does not say. The appellant purported to accept this renunciation of the payments called for by the agreement, but coupled therewith an assertion of his intention of insisting otherwise upon the deed, including the provision as to living separate from the respondent.

It will be convenient, first, to deal with the defence founded upon election. It is, of course, for the appellant, with respect to this defence as with respect to the others, to make out his case. He contends that the respondent had a choice as between her rights under the agreement and a claim under the statute, and having chosen the latter she has lost the former.

Appellant cites the following from the judgment of Lord Blackburn in *Scarf* v. *Jardine* (1):—

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean

(1) (1882) 7 App. Cas. 345 at 360.

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an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

In this judgment Lord Blackburn, as pointed out by Lord Atkin in *United Australia* v. *Barclays Bank* (1), is dealing not with alternative remedies but with the case of a person who is presented with two inconsistent rights, and the important thing to observe for present purposes is that in order that a plaintiff becomes disentitled to a right by electing to enforce another, he must, to begin with, have actually had a choice of two rights. This underlies the judgments of all of their Lordships.

In the course of his judgment in the *United Australia* case, (*supra*), Lord Atkin said at p. 30:—

> On the other hand, if a man is *entitled* to one of two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is, *by reason of the inconsistency,* no longer his to choose.

In my opinion the respondent, on the facts in the case at bar, did not have any cause of action under the *Deserted Wives' and Children's Maintenance Act,* and therefore was not, in fact, faced with an election at all.

In order that a wife may obtain an order under s. 1, subsection (2) of the statute, she must have been

> living apart from her husband *because of* * * * his refusal or neglect, without sufficient cause, to supply her with food and other necessaries when able so to do.

In a case where the parties are already living apart by consent when the refusal or neglect occurs, it cannot be said of the wife that she is living apart "because of" such refusal or neglect. In *Hofland* v. *Hofland* (2), it was held that a wife could not succeed under the statute where the husband and wife were not living together when the alleged desertion occurred. It may be that it was as a result of this decision that the amendment of 1935 set out above was made and that a case of desertion within the statute may be made out where the original separation was consensual but where, as indicated by Lord Greene in *Pardy* v. *Pardy* (3), its character has changed. It is not necessary to consider the effect of the amendment for

(1) [1941] A.C. 1 at 30. (2) [1933] O.W.N. 608.
(3) [1939] P. 288.

whatever its effect may be in another case, neither of the parties to the instant case had changed his or her intention to live apart. It cannot, therefore, be said that the respondent, at the time she took the proceedings under the statute, was living apart from the appellant "because of" his refusal or neglect to maintain her. That being so, the respondent was not entitled to any rights under the statute and the learned magistrate so found.

Moreover, for all that appears, and it was for the appellant to show otherwise if it were the fact, he did not change in those proceedings the position which he had earlier taken up in the correspondence, namely, insisting on the efficacy of the deed of separation. In these circumstances, the defence founded on election cannot succeed.

In my opinion the order made in favour of the infant does not affect the situation. S. 2 of the statute creates an independent liability on the part of the appellant toward his child, which, by s. 4, the respondent was entitled to assert on its behalf. No question arises in the present case as to the effect of the order upon the liability of the appellant under the covenant in the agreement with respect to the child's maintenance as there is no claim made in these proceedings with respect to the child.

The appellant's argument founded on estoppel, he admits, is involved in his argument with respect to election. It is therefore not necessary to deal separately with this contention.

I would dismiss the appeal with costs.

CARTWRIGHT J. (dissenting):—This is an appeal, by special leave, from a judgment of the Court of Appeal for Ontario affirming, without written reasons, a judgment of Gale J. in favour of the respondent for certain arrears under a separation deed.

The relevant facts are not disputed and may be briefly stated. The respondent is the wife of the appellant. They were married in 1935. There are two children of the marriage, a boy born March 1, 1937 and a girl born September 7, 1940. The parties finally separated in 1948 and subsequently entered into a separation deed, dated the 16th of September, 1948. They have lived apart ever since. The deed recites the marriage, the birth of the

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children, the fact that unhappy differences have arisen and that the parties have agreed to live separate and apart from each other and proceeds:—

4. Now this indenture witnesseth that in consideration of the mutual covenants herein contained, it is hereby agreed and declared as follows:

The deed provides that the husband shall have the custody of the boy and the wife of the girl with rights of reasonable access in each case.

The deed contains the following mutual covenants:—

5. The parties hereto will henceforth live separate and apart from each other, and neither of them will take proceedings against the other for the restitution of conjugal rights, or molest or annoy or interfere with the other in any manner whatsoever. Each party covenants and agrees with the other not to utter any words which would constitute defamation or slander of the other. Each party releases the other of all claims for anything existing up to the present time, except such rights or obligations as are imposed under the terms of this agreement.

The deed contains the following covenants by the husband:—

10. The husband will pay to the wife, as and for her separate property, an allowance of $30 on the third day of each month during the term of their joint lives if they shall so long live separate from each other, and on condition that and so long as the wife shall continue to lead a chaste life, the first of such payments to be made on the third day of August, 1948. The payments shall cease upon the remarriage of the wife.

It is expressly provided, however, that the payments of $30 per month are to be made up to and including the month of January, 1950, and commencing with the payment due on the third day of February, 1950, the said payments to the wife shall be increased to the sum of $40 per month.

12. The husband shall pay for the maintenance of the said infant child, Jennifer Elizabeth Findlay, the sum of $35 per month, such payments to be made on the third day of each month, and to commence on the third day of August, 1948; and the payments to cease upon the said infant attending the age of eighteen years.

14. In the event of the said infant child, Jennifer Elizabeth Findlay, requiring special medical or surgical treatment, the wife shall consult with the husband as to the treatment to be given, and the physician or physicians to be consulted and the husband shall pay to the wife a sum in addition to the monthly payment set forth in Paragraph 12 herein, sufficient to pay any medical or hospital accounts and all debts incurred in connection with such treatment of the said child.

The husband also covenants to pay the sum of $50 to the wife and that she shall have certain chattels and furniture, set out in a schedule to the deed, it being expressly provided that the execution of the deed shall pass the title in such chattels to the wife.

The deed contains a covenant on the part of the wife to bar dower and the following covenants:—

8. The wife shall have the custody and control of the infant child, Jennifer Elizabeth Findlay, and shall be responsible for her support, maintenance and education out of the moneys paid to her under the provisions of paragraph No. 12 of the within agreement, subject to the provisions of Paragraph No. 14 with regard to extra medical care.

11. The wife agrees that from the date of this agreement she will pay her own debts and will keep the husband indemnified therefrom and if the wife shall make default in observing this covenant, all moneys which shall be paid by the husband in respect of any debt or liability of the wife shall be deducted by him out of the monthly instalments payable to the wife under the provisions of this agreement, saving and excepting therefrom only any payments or expenses which might be incurred by the wife in accordance with paragraph 14 hereof arising out of sickness, accident or other emergency on behalf of the infant child, the said Jennifer Elizabeth Findlay.

The husband made all payments provided in the deed up to and including the payment due on the 3rd of June, 1949. Following the making of this payment, which, at the request of the wife, was made a few days in advance of its due date, the wife wrote to the husband, on May 31, 1949, stating that unless he at once made her an increased living allowance she would not hesitate to take him into court. The letter says, in part: "What have I got to lose? —very little." It goes on to say that any court "would hardly allot us less than $65." It mentions that the court proceedings would be embarrassing to the husband, uses the expression "when I walk into court I shall have thrown my hat over the windmill", says that the court proceedings might get the wife custody of the son and concludes

* * * to proclude (*sic*) further stalling the least amount I would consider *now,* not next February is $100 a month and that is not unreasonable. I would not bother with a divorce unless the whole thing were in the form of a settlement, said settlement to be equivalent to at least ten (10) years of aforesaid allowance. I would suggest that you reply with as little delay as possible as we are completely ready to go ahead. I am affording you this last courtesy of a letter from me, rather than my lawyers.

Under date of June 29, 1949, the husband wrote a long letter in answer in which he says, in part:—

You are renouncing the payments under the agreement. Very well, I consent to this repudiation, but with one reservation, if it is open to me to make it. If it is not open to me, I will not let that reservation prevent your renunciation being complete. But at least, should the occasion arise, I will argue that the agreement is divisible and that I can

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still rely on the clauses concerning living separate, defamation, release of prior claims, custody of Peter, dower. If my argument should fail, your repudiation will be complete.

You are free, therefore, to attempt any court proceedings you feel like, but I will defend my position to the end * * *

* * *

Now that you have thrown over the provisions made in the agreement for the two of you, two results follow immediately. There will be no more cheques for you and you will kindly make arrangements to return Jennifer to my care immediately.

To this letter the wife replied on or about July 3, 1949:—

Alright (*sic*) Don, I am quite willing to fight this thing out in court—sooner or later it had to come to a head.

In the concluding paragraph of the letter, after reproaching the appellant with having paid attention, prior to the date of the separation deed, to two women who are named the respondent continues:—

* * * I'm bringing these few isolated occurrences to your attention because I wonder if you've forgotten? Fortunately for me but unfortunately for them these people are all readily accessible and it is only your stubborness to see reason that makes it necessary to smear them as well as you.

See you in court.

The husband made no further payments under the deed, and the wife made application for maintenance for herself and the daughter in the York County Family Court, under *The Deserted Wives' and Children's Maintenance Act,* on July 8, 1949, the instalment under the deed due on July 3rd being then in arrears. After an adjournment on July 19, 1949, the application was disposed of by the Magistrate on July 26, 1949, the adjudication being in the following words:—

Dismissed as to wife. Order for $10 per week for support of child, first payment to be made July 26, 1949, at the York County Family Court Office.

The husband has ever since paid the $10 per week. Neither party has taken any steps under s. 5 of the Act to have the application reheard or to rescind or vary the order of the Magistrate and such order is still in force.

In October, 1949, the wife commenced an action in the First Division Court of the County of York for the arrears under paragraph 10 of the deed commencing with the payment falling due on July 3, 1949. This action was transferred to the Supreme Court of Ontario by order of Gale J. and the action was tried by that learned judge. The effect

of his judgment is to hold that the wife is entitled to enforce the covenant contained in paragraph 10 of the deed and at the same time to enforce the order of the Magistrate requiring payments of $10 a week. No attempt was made by the wife to assert a claim under paragraph 12 of the deed.

For the appellant it is argued that the respondent, by her earlier letter referred to above, unequivocally repudiated the contract, that this repudiation was accepted by the appellant in his letter of June 29th and that the contract thereupon ceased to exist. While I do not find it necessary to decide whether this is so, I incline to the view that it is not. I regard the wife's letter of May 31st as a definite statement that she was no longer going to regard herself as bound by the contract and was going to seek her rights at law outside its provisions. It may well be that it was then open to the husband to accept this as a complete repudiation by the wife and to notify her that he was treating the contract as at an end but I incline to the view that he did not do so. I read his letter of July 29th, quoted in part above, as a conditional, not an unqualified, acceptance in which he seeks to take the position that the wife has forfeited all her rights under the agreement but that he retains at least some of his rights.

For the same reason I do not think that the husband's letter of June 29th amounted to an unconditional offer to regard the contract as at an end which can be said to have been accepted by the wife's letter of July 4th but, again, I do not find it necessary to determine this question. For the purposes of this appeal I will assume, without deciding, that counsel for the respondent is right in his contention that after the letter of July 4th was delivered to the husband the wife was still in a position to insist that the contract was in force. At this time, however, as has been mentioned above, the husband had made default in the payments due on July 3rd. It is true that the reason he assigned for this was the unequivocal statement of the wife that she did not intend to abide by the contract but the fact remains that he made default not through inadvertence or temporary financial embarrassment but deliberately and in pursuance of his statement quoted above "There will be no more cheques for you." His default

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was not of the temporary sort made by the husband in *Kunski* v. *Kunski* (1), which was held by the learned President not to entitle the wife to regard the deed as repudiated by the husband. It was rather of the sort dealt with in *Kennedy* v. *Kennedy* (2), where default was accompanied by the expressed intention not to make further payments and was held to entitle the wife to regard the deed as at an end.

In *Kunski* v. *Kunski* (*supra*) the learned President said at page 19:—

> I quite agree that this is a matter of great importance, and a substantial part of the consideration for the deed; and if a serious and substantial refusal by the respondent to pay one of the instalments can be shewn, then he is not entitled to enforce a deed from the terms of which he has departed.

I am of opinion that following the husband's default in making the payments due on July 3rd the wife had the option of insisting upon the contract or of treating it as at an end and pursuing such rights as she might have apart from the contract. The effect of the judgment in appeal is to hold that having chosen the latter alternative and pursued her rights apart from the contract by proceedings in the Family Court the wife may, if dissatisfied with the result of such proceedings, re-assert her rights under the contract. This is challenged by the appellant and is the substantial point to be decided on this appeal.

In approaching the solution of the question it is well to bear in mind the words of Lord Atkin in *Hyman* v. *Hyman* (3) where, after referring to a separation deed as "a class of document which has had a chequered career at law", he continues:—

> Full effect has therefor to be given in all Courts to these contracts as to all other contracts. It seems not out of place to make this obvious reflection, for a perusal of some of the cases in the matrimonial Courts seems to suggest that at times they are still looked at askance, and enforced grudgingly. But there is no caste in contracts. Agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement, of whose nature indeed they sometimes partake. As in other contracts stipulations will not be enforced which are illegal either as being opposed to positive law or public policy. But this is a common attribute of all contracts, though we may recognize that the subject-matter of separation agreements may bring them more than others into relation with questions of public policy.

(1) (1899) 68 L.J.P. 18. (2) [1907] P. 49.
(3) [1929] A.C. 601 at 625, 626.

It appears to me that the applicable rules of contract law are well settled. The default by the husband in the circumstances mentioned above amounted in law to a repudiation by him of the contract (or, if the contract be regarded as severable which I do not think it is, of those parts of it dealing with the obligation of the husband to make payments and of the wife to accept such payments and keep the husband indemnified from further claims). Such repudiation by one party could not of itself discharge the contract. The wife had a choice of remedies. She might sue the husband on the contract or she might treat it as at an end. If the wife chose the latter course the result would follow that the contract would no longer be in existence and the situation would be as stated in *Lush on Husband and Wife,* 4th Edition, (1933), pages 385 and 386:—

> It would seem that since the right of a married woman to maintenance is established in status, not contract, and in common law, not statute, that upon the payments appointed under the agreement terminated from any cause, the wife's right to be maintained by her husband would revive, and she could either pledge his credit as agent of necessity for her necessaries, or seek from him the payment of maintenance by the methods that are secured to a wife by statute * * *

The wife chose to treat the contract as at an end. She could not in the Family Court sue upon the contract. She sought there an order for payments in excess of those which the contract provided but this fact is not of importance. The important fact is that she sought payment by one of the methods secured to her by statute and not by virtue of the contract.

Having done this, it is my view that she could not at any later date take the position that the contract was still in force. She had made her election. Election is defined in Wharton's Law Lexicon, 12th Ed., page 317, quoted with approval in *Cooper* v. *C.N.O.R.* (1) as "The obligation conferred upon a person to choose between two inconsistent or alternative rights or claims." In *Scarf* v. *Jardine* (2), Lord Blackburn said:—

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he

(1) (1924) 55 O.L.R. 256 at 260. (2) (1882) 7 App. Cas. 345 at 360.

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has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election:

We were not referred to any case in which a wife has obtained an order for maintenance, or an award of alimony, by way of supplement to the sums being paid to her under a separation deed. I do not mean by this that a wife is of necessity limited to the payments under a separation deed or that such a deed can always be successfully pleaded in bar in proceedings either for alimony or maintenance during the subsistence of marriage or for maintenance on its dissolution. Such a question does not arise in this appeal. It has recently been held in England that a wife, who is receiving payments under a separation deed which are so inadequate that it can be said that the husband is neglecting to provide reasonable maintenance for her, may take proceedings for maintenance either before the justices or in the high court,—see *Tulip* v. *Tulip* (1). It has also been held that no separation deed can oust the jurisdiction of the court to decree maintenance for a wife on the dissolution of her marriage,—see *Hyman* v. *Hyman* (*supra*). I have found no case in which upon a wife taking proceedings to require a husband to make payments differing from and in excess of those provided by a separation deed the husband, instead of insisting on the deed, has taken the position that the deed is at an end, and in which the deed has been held to remain in force. To so decide would, I think, be contrary to the principle that a person may not approbate and reprobate. A result of so deciding would be that a provision in a separation deed for periodical payments to be made during the joint lives of the spouses would amount to nothing more than the statement of an irreducible minimum, binding the husband but leaving the wife free, so often as she might please and in such forums as she might choose, to seek additional payments. It is one thing to hold that the power conferred upon the courts by statute to require a husband to properly maintain his wife cannot be fettered by agreement between the parties, but quite another thing to hold that a wife may continue throughout the joint lives of herself and her husband to

(1) [1951] 2 All E.R. 91.

rely upon a separation deed while seeking support by proceedings in the court outside of, and in a manner inconsistent with, the terms of the deed.

I have not overlooked the fact that in the judgments in *Hyman* v. *Hyman* (*supra*) expressions were used indicating that in the proceedings to fix maintenance which were to follow the judgment the court might well hold the provisions of the separation deed there under consideration to constitute sufficient maintenance and that similar expressions are found in the judgment in *Tulip* v. *Tulip* (*supra*); but in each of these cases the husband, far from seeking to repudiate the deed, had at all times faithfully performed it, was willing to continue to do so, was expressly taking the position that the deed remained in force and was relying on it as constituting a sufficient provision for the wife. I find nothing in the judgments in either case to suggest that on the wife commencing the proceedings for maintenance it would not have been open to the husband to elect to treat the deed as at an end. In neither case did that question arise.

I find myself in agreement with the conclusion of McDonald J., as he then was, in *Bouveur* v. *Bouveur* (1), which judgment was, at least by implication, approved by the Court of Appeal of Saskatchewan in *Wagner* v. *Wagner* (2). *Bouveur* v. *Bouveur* was an action by a wife against her husband to enforce the maintenance provisions of a separation agreement. The relevant facts, admitted in a stated case, were that the husband and wife had been living apart for some years under a separation agreement a term of which was that the husband should make semi-monthly payments to the wife. Partial default had been made in payment of the instalments due on February 15th and March 1st, 1936. On March 23, 1936, upon the wife's application, an order had been made under the *Deserted Wives' Maintenance Act* requiring the husband to pay $20 a week to the wife. On November 23, 1936, an order had been made under the same Act rescinding the earlier order and this had been affirmed on appeal. On these facts the question submitted to the court was: "Has the plaintiff by proceeding under the *Deserted Wives' Maintenance Act* elected her remedy and thereby disentitled herself from

(1) [1941] 2 D.L.R. 348. (2) [1949] 4 D.L.R. 848.

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enforcing against the defendant the provisions of the said separation agreement as to payment of maintenance and support?" This question was answered in the affirmative. It will be observed that it was not the making of the order by the magistrate but the election by the wife to proceed under the Act instead of on the contract which brought the latter to an end. I do not find anything in the Ontario cases referred to by the learned trial judge which appears to me to be at variance with the conclusion reached in the *Bouveur* case. In neither *Moyer* v. *Moyer* (1), nor *Smellie* v. *Smellie* (2) did any question of contractual rights arise. Except for one sentence, which I have italicized, it seems to me that the following passages in the judgment of McTague J.A. concurred in by Middleton and Masten JJ.A. in *Stevens* v. *Stevens* (3), support the reasoning in the Bouveur judgment:—At page 245:—

> The question of the defendant's liability for the difference between what he is ordered to pay by the Domestic Relations Court and what is stipulated for by the separation agreement is much more important.

At pages 245 and 246:—

> The plaintiff had alternative remedies as I see it, not cumulative remedies. She was bound to elect. Counsel for the plaintiff has argued strenuously that the Domestic Relations Court has no jurisdiction with respect to the separation agreement. With that I agree. All the Act provides in this regard is that the circumstance of a separation agreement shall not in itself take the plaintiff out of the category of a deserted wife and thereby bar her from relief under the Act: sec. 1(2). The plaintiff's difficulty, as I see it, does not arise from any lack of jurisdiction in the Domestic Relations Court with respect to the separation agreement but from her own election to invoke the jurisdiction of the Court notwithstanding the separation agreement. It is unnecessary to decide whether the order of the Domestic Relations Court abrogates the agreement, but *I take the view that the operation of the separation agreement is under suspension as long as the order is outstanding.*

At pages 246 and 247:—

> As I see it, she has chosen to forego her rights under the agreement and cannot be allowed to adopt part of it in answer to the consequences of her own act.

Counsel for the respondent argued that the correct inference to be drawn from the italicized words quoted above is that notwithstanding the proceedings in the Domestic Relations Court the agreement remained in force, although temporarily under suspension and would

(1) [1945] O.W.N. 463. (2) [1946] O.W.N. 458.
(3) [1940] O.R. 243.

revive if and when that court's order terminated. As I read his judgment, McTague J.A. expressly refrained from so deciding, being of the view that a decision on the point was unnecessary. I think that the suggested inference would be at variance with the other portions of his reasons set out above.

In the case at bar, for the reasons given above, I am of opinion that the separation deed is no longer in force. The deed has come to an end because, the husband having made default in an essential matter, the wife elected to treat it as at an end and to pursue her rights apart from contract.

I, of course, express no opinion as to whether or not the wife should have been refused maintenance by the magistrate. *The Deserted Wives' and Children's Maintenance Act* provides for rehearings and for the confirmation, rescission or variation of any order made in that court. Nor do I express any opinion as to the wife's right to alimony if she should require the husband to receive her and support her as his wife and he should refuse to do so or if the facts are such that she is entitled, apart from the provisions of the separation deed, to live apart from him and to require him to maintain her. In my view all that we have to decide on this appeal is whether the deed of separation remains in force and I have already indicated that, in my opinion, it does not.

I would allow the appeal and direct that judgment be entered dismissing the action. There should be no order as to the costs of this appeal or of the motion for leave to appeal or in the courts below.

Appeal dismissed with costs.

Solicitor for the appellant: *R. M. W. Chitty.*

Solicitors for the respondent: *McLaughlin, Macaulay, May & Soward.*

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*Oct. 23

WILFRED WATTERWORTH .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF PRINCE EDWARD ISLAND.

Criminal Code—s. 286—Theft—Grand Juries—Sufficient Evidence for true bill.

APPEAL from the judgment of the Court of Criminal Appeal of Prince Edward Island (1), Campbell C.J. and Tweedy and McGuigan JJ., dismissing the accused's appeal from his conviction and sentence following his trial before McGuigan J. and a jury on a charge of theft under s. 386 of the *Criminal Code*. Following a preliminary inquiry a grand jury returned a true bill on the indictment. Prior to the swearing of the petit jury appellant's counsel moved to quash on the grounds that the grand jury had examined only one witness and that from the evidence given by him at the preliminary hearing the Crown had failed to establish the identity, ownership or unlawful conversion of the goods, essential elements of the offence charged. In support of the motion *Rex* v. *Court* (2) was cited and the judgment of Campbell C.J. therein that an indictment found by a grand jury on inadmissible or inadequate material must be quashed. The motion was refused and the trial proceeded with. On the appeal to the Court of Criminal Appeal and before this Court the same ground was pressed, as well as misdirection and non-direction by the trial judge.

D. L. Mathieson K.C. for the appellant.

J. O. C. Campbell K.C. for the respondent.

At the close of the appellant's argument the Court retired. On its return to the bench, Kerwin J. speaking for the Court stated: It will not be necessary to call on you, Mr. Campbell. On the first point we express no opinion on the

(1) (1951) 26 M.P.R. 159; 100 C.C.C. 64.

(2) (1947) 19 M.P.R. 436; 3 D.L.R. 223; 88 Can. C.C. 27.

*PRESENT: Kerwin, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

correctness of the decision in *Rex* v. *Court*. It is sufficient to say there is nothing in this case to show that the grand jury did not have before it sufficient evidence to justify it bringing in a true bill. On the other points we are all of opinion that while there were errors in the trial judge's charge to the jury, those errors were immediately corrected upon them being called to the judge's attention by Counsel for the appellant. In the circumstances, it cannot be said that the trial judge did not put before the jury the defence raised on behalf of the appellant.

The appeal is, therefore, dismissed.

Appeal dismissed.

JAMES E. WILDER .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Sale of assets, consideration for which was monthly payments during life of vendor—Whether "annuity" within meaning of s. 3(1) (b) of the Income War Tax Act, R.S.C. 1927, c. 97 and amendments.

The appellant sold his real estate business together with all its assets, the purchaser assuming all the liabilities of the vendor. One of the considerations for the sale was that the purchaser would pay the vendor an annuity during his lifetime of $1,000 per month.

The appellant was assessed for income tax for the years 1941, 1942 and 1943 on the full amount of the monthly payments of $1,000 each, on the ground that that amount was income within the meaning of s. 3(1) (*b*) of the *Income War Tax Act*, which provided that " 'income' means the annual net profit or gain or gratuity . . . and also the annual profit or gain from any other source including . . . *annuities or other annual payments* received under the provisions of any contract except as in this Act otherwise provided; . . ."

These assessments, on appeal, were maintained by the Minister of National Revenue and by the Exchequer Court of Canada.

Held, reversing the judgment appealed from (Rand and Kellock JJ. dissenting), that the monthly payments were not taxable income within the meaning of s. 3(1) (*b*) of the *Income War Tax Act*, R.S.C. 1927, c. 97 and amendments, as they were not an income receipt but instalments due on the purchase price of certain assets. The appellant had bought no annuity subject to income tax.

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*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Fauteux JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), affirming the decision of the Minister of National Revenue.

Harold E. Walker K.C. and *Robert H. E. Walker K.C.* for the appellant. The payments in question, being payments on account of the purchase price constitute repayments of capital and are not "annuities or other annual payments" within s. 3(1) (*b*) of the *Act*. There is only one "source of income" involved namely the properties sold. There is only one item of "income" involved namely the revenue or net revenue from that "source of income". The payments constitute the purchase price for the "source of income" and not payments for the income. The payments do not become "annuities" taxable under s. 3(1) (*b*) merely because they are payable for the life of the vendor. The test is whether they constitute a return of capital or not. The cases of *Foley* v. *Fletcher* (2), *Dott* v. *Brown* (3) and *Income Tax Case No. 98* (4) are relied on.

The basic rule or principle of the *Income War Tax Act* is to tax income and not capital unless where to a limited extent as under s. 3(*g*) it is expressly declared that capital may be taxed. The certainty or uncertainty of the term is not a factor to be taken into account in the determination of what is and what is not taxable annuity.

If there is any doubt as to the liability to the tax, it should be resolved in favour of the taxpayer: *Tennant* v. *Smith* (5) and *O'Connor* v. *Minister of National Revenue* (6). The question of liability is most ambiguous in the case at bar. Annuities subject to tax are not defined. It has been held and is well established that not all annuities are subject to tax. There is not an inkling in s. 3(*b*) as to what annuities are to be taxed under that subsection. In every other section or subsection of the *Act* where annuities are mentioned it is clear from the context that only annuities purchased from the Dominion or Provincial Government or from Insurance companies and annuities created under wills, gifts, trusts or settlements are in contemplation. There is, therefore, some reasons for inferring that the above kinds of annuities were what was contemplated by the 1940 re-enactment of s. 3(*b*). Before

(1) [1949] Ex. C.R. 347.
(2) (1858) 28 L.J. (Ex.) 100.
(3) [1936] 1 All. E.R. 543.
(4) [1927] 3 S.A.T.C. 247.
(5) [1892] A.C. 150.
(6) [1943] Ex. C.R. 168.

1940, annuities mentioned in para. (*b*) referred expressly to insurance annuities. The 1940 amendment is said to have been enacted to "catch" payments such as those held not taxable in the case of *Shaw* v. *Minister of National Revenue* (1).

The payments should not be considered to be taxable annuities merely because they are referred to in the contract of sale as such: *O'Connor* v. *Minister of National Revenue supra, The Secretary of State in Council of India* v. *Scoble* (2) and *Perrin* v. *Dickson* (3).

It is felt that the payments come rather within the category of payments contemplated in s. 3(2) enacted in 1942 and which appears to have been specially enacted to "catch" the interest content of payments, particularly payments on account of the purchase price of property where no interest was stipulated. The enactment in 1942 of s. 3(2) implies recognition that this category of payments existed before and that they were not chargeable as annuities under s. 3(1) (*b*). If s. 3(1) (*b*) covers any annual payment then there would be no need for s. 3(2).

As to the disposal of the appeal if the Court comes to the conclusion that the assessments should have been made under s. 3(2), the cases of *Shaw* v. *Minister of National Revenue supra* and *Lumbers* v. *Minister of National Revenue* (4) should be followed on that point. The assessments are good or bad and therefore should be maintained or dismissed and not returned to the Minister. In any event, there would be no tax for the year 1941.

Subsidiarily, even if the payments were held to be annuities within the purview of s. 3(1) (*b*), then at the most only the income or interest content should be chargeable with income tax. This submission is based on the construction to be placed on s. 3 of the *Act* and its members, where it is shown plainly that it is not the gross income that is subject to the tax but only the net income. The net profit or gain to the appellant in the payments due him under the contract is not the total amount of such payments. (Vide *Samson* v. *Minister of National Revenue* (5), *Shaw* v. *Minister of National Revenue supra* and *O'Connor* v. *Minister of National Revenue supra*).

(1) [1939] S.C.R. 338.
(2) [1903] A.C. 299.
(3) [1929] 2 K.B. 85.
(4) [1944] S.C.R. 167.
(5) [1943] Ex. C.R. 17.

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It is further submitted that purchased annuities and annuities payable by gratuitous title under a gift, will or settlement are the only kind of annuities that are contemplated in the *Act*. There is nothing in the *Act* to justify the inclusion of any other annual payments as coming within the meaning of "annuities or other annual payments" mentioned in s. 3(1) (*b*).

The case of *Chadwick* v. *Pearl Life Insurance Co.* (1) was also cited.

Paul Dalmé and *E. S. MacLatchy* for the respondent. The argument that the payments are not an annuity but are in the nature of a return of capital is not novel and has been decided against appellant in the case of *Lumbers* v. *Minister of National Revenue* (2). The whole question is what is an "annuity": *Perrin* v. *Dickson* (3). The payments in the present case are the price of the sale but payable in an "annuity" as defined in s. 3(1) (*b*). The payments are also an "annuity" because of the uncertain term and because of the fact that there is no capital to be recovered to the appellant. They cease to be capital and become net profit: *Sothern-Smith* v. *Clancy* (4).

S. 3(2) of the *Act* was enacted to deal with annual payments not covered by s. 3(1) (*b*): such as an instalment payment on a capital sum.

The case of *Dott* v. *Brown* (5) is distinguishable. The South African case (6) cited by the appellant, is the opposite of the case at bar and has no bearing.

Harold E. Walker K.C. replied.

THE CHIEF JUSTICE:—On the 6th of February, 1932, James E. Wilder, the appellant, sold to Wilder Norris, Limited, properties consisting of land, buildings, real estate, securities, listed in fourteen schedules appended to an agreement of that date. In effect, Wilder was thus selling his real estate business with all its assets, and as part of the consideration of the sale the purchaser agreed to assume all liabilities of the vendor. One of the considerations for the sale was that the purchaser should "pay to the vendor as from the first day of December, 1931, an annuity during his lifetime of $1,000 per month".

(1) [1905] 2 K.B. 507.
(2) [1944] S.C.R. 167.
(3) [1930] 1 K.B. 107.
(4) [1941] 1 All. E.R. 111 at 117.
(5) [1936] 1 All. E.R. 543.
(6) [1927] 3 S.A.T.C. 247.

The appeal is concerned with income tax assessments for the years 1941, 1942 and 1943, in each of which the appellant was assessed for income tax on the full amount of the monthly payments of $1,000 each, aggregating $12,000 per annum. These assessments were the subject of appeals to the Minister of National Revenue and to the Exchequer Court of Canada (1). The assessments were maintained by both the Minister and the Court (1).

The decision of the Minister in affirming the assessments was that the amount of $1,000 per month received by the appellant was income within the meaning of paragraph (*b*) of section (3) of the *Act,* and that the said sum is not within the exemption provided by paragraph (*k*) of section (5) of the *Act.*

Section 3(*b*) of *The Income War Tax Act,* so far as it may be said to apply to the matter, reads thus:—

> 3. (1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity . . . and also the annual profit or gain from any other source including
>
> (*b*) annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided; . . .

The reason given by the appellant for contesting the assessment is that the payments in question, being payments on account of the purchase price of the property sold by the appellant, constitute repayments of capital and are not annuities or other annual payments coming within the purview of section 3(1) (*b*). Subsidiarily the appellant claims that, if the payments in question come within the purview of that section, at the most only the income or interest content is subject to tax.

Before the Exchequer Court (1) the appellant also submitted that if the payments were held to be annuities under section 3(1) (*b*) they should be entitled to the exemptions provided under section 5(*k*). At Bar the appellant abandoned this latter contention, so that the present appeal stands to be decided exclusively on the proper construction of section 3(1) (*b*) and its application to the facts.

There can be no doubt that the sum of $1,000 per month payable to the appellant under the agreement of the 6th of February, 1932 (being the sale to Wilder Norris, Ltd.)

(1) [1949] Ex. C.R. 347.

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is part of the purchase price and in essence, therefore, capital payment. Of course, section 3(1) (*b*) must be understood and interpreted as being part of section 3. That section clearly defines income "for the purposes of this Act" as meaning "the annual net profit or gain". It may be wages, salary, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling, as the case may be, whether derived from sources within Canada or elsewhere. It shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not; and also "the annual profit or gain from any other source including", after which there is subsection (*b*) as above quoted. It seems to me clear, therefore, that what the section aims at as being income is the annual profit or gain.

It is obvious that the annual payments stipulated in favour of the appellant in the present instance cannot be described as annual profit or gain, and that on the proper construction of section (3) (1) (*b*) an annuity or annual payment, received under the provisions of a contract, such as the present one, in order to be taxable must be an annual profit or gain. The whole economy of section (3)—and for that matter all of the *Income War Tax Act*—is that it taxes income and not capital. This view is further supported by subsection (2) of section (3) whereby if the Minister is of opinion that under any existing or future contract or arrangement for the payment of money, payments of principal money and interest are blended or payment is made pursuant to a plan which involves an allowance of interest, "whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to determine what part of any such payment is interest and the part so determined to be interest shall be deemed to be income for the purposes of this Act". This was not done in the present case and the decision of the Minister is not based on that subsection.

In my view the true construction to be given to section (3) (1) (*b*) is that the annual profit or gain derived from the source of annuities or other annual payments is taxable

income, but that the annuity, or other annual payment, received under the provisions of a contract, if the Minister has not expressed the opinion that some interest was blended with principal money, is not taxable under section (3) (1) (*b*).

I have no doubt that Parliament could declare to be income an annuity or annual payment which represents capital money, but, in my opinion, Parliament has not done so.

As was said by Chief Justice Sir Lyman Duff in *Shaw* v. *Minister of National Revenue* (1):

> The legislature, it seems to me, is at pains to emphasize the distinction between income and the source of income. The income derived from the capital source is income for the purposes of the Act. The source is not income for the purposes of the Act.

I do not think the decision in *Lumbers* v. *Minister of National Revenue* (2), has the effect of departing from that reasoning.

The appeal should be allowed with costs both here and in the Exchequer Court.

The judgment of Taschereau and Fauteux, JJ. was delivered by:—

TASCHEREAU J.:—On the 6th of February, 1932, the appellant sold to Wilder Norris Limited certain assets for the following consideration:—

1. The assumption by the purchaser of all existing debts, liabilities, contracts and engagements of the appellant;

2. The sum of $10,000 in cash;

3. The sum of $1,000,000 in debentures of the purchaser;

4. $100,000 by the allotment to the appellant or his nominees of certain shares of the company;

5. The obligation by the purchaser to pay to the vendor as and from the first day of December, 1931, an *annuity* during his lifetime of $1,000 per month, and of $75 per month to Mrs. F. E. Puffer.

In the years 1941, 1942, 1943, the appellant was assessed for income tax on the full amount of the monthly payments of $1,000 each, aggregating $12,000 per annum. The assessments were the subject of appeals to the Minister

(1) [1939] S.C.R. 338 at 342. (2) [1944] S.C.R. 167.

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of National Revenue and to the Exchequer Court of Canada (1). They were maintained by both the Minister and the Exchequer Court, hence the present appeal to this Court.

It is the appellant's submission for contesting the assessments, that the payments in question, although referred to as "annuities" in the deed of sale, are payments on account of the purchase price, and are not *"annuities or other annual payments"*, coming within the purview of section 3(1) (*b*) of the *Income Tax Act*.

The *Act* defines as follows "taxable income":—

> 3.(1) For the purposes of this Act, "income" means the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary, or other fixed amount, or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be whether derived from sources within Canada or elsewhere; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and, whether such gains or profits are divided or distributed or not, and also the *annual profit or gain* from any other source including
>
> (*a*) the *income from but not the value of property acquired by gift, bequest, devise or descent;* and
>
> (*b*) *annuities or other annual payments received under the provisions of any contract* except as in this Act otherwise provided;

The word "annuity", is not defined in the *Act*, but the reading of section 3(1) (*b*) with other sections of the same Act, would seem to indicate that the whole scheme of the law is undoubtedly to tax *profits or gains*, and not capital. When Parliament intended to tax capital, it has clearly said so. Section 3(1) (*g*) is for instance an example of such an intention. It reads as follows:—

> 3. (1)
>
> (*g*) annuities or other annual payments received under the provisions of any will or trust, irrespective of the date on which such will or trust became effective, and notwithstanding that *the annuity or annual payments are* in whole or in part *paid out of capital funds* of the estate or trust and whether the same is received in periods longer or shorter than one year;

It would have been useless for Parliament to say that "annuities or other annual payments received under the provisions of a will, even if *paid out of capital funds"*,

(1) [1949] Ex. C.R. 347.

were taxable, if all these payments were already considered as "income" by virtue of section 3(1) (*b*).

Furthermore, section 3(2) shows that "annual payments" which are "capital" are excluded from the field of taxation. It says:—

> (2) Where under any existing or future contract or arrangement for the payment of money, the Minister is of opinion that
>
> (*a*) *payments of principal money and interest are blended,* or
>
> (*b*) payment is made pursuant to a plan which involves an allowance of interest;
>
> whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to *determine what part of any such payment is interest* and the part so determined to be *interest shall be deemed to be income* for the purposes of this Act.

If the respondent is right in his contention, we would have to come to the illogical conclusion that, when in an annual payment, capital and interest are blended, only that part of the payment which is interest may be taxable, and that a payment representing only capital, as in the present instance, would be taxable *in toto*.

The respondent relied on *Lumbers* v. *Minister of National Revenue* (1). In this case, Lumbers had entered into a contract with an insurance company which entitled him, after paying premiums for twenty years, to receive, at his option, either a lump sum, or monthly payments during his lifetime with the payments going thereafter to his wife, if surviving him, during her lifetime, and with a guaranteed period of payment for twenty years. During the payment of the premiums the contract constituted a policy of insurance, and upon Lumbers' death, the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of twenty years. After paying the premiums for twenty years, Lumbers elected to receive the monthly payments, and it was held that these monthly payments were *"annuities"*, and therefore taxable.

I do not think that this decision is an authority for the determination of the present case. The "annuities" payable by an insurance company, in order to be exempt from taxation, must be derived from an annuity contract which was *"like" annuity contracts* issued by the Dominion or a Province. The contract in the *Lumbers* case was not a "like" contract as required. Furthermore, in view of section

(1) [1944] S.C.R. 167.

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3(1) (*b*) of the *Act*, it was held that the taxation of the *annuities* paid, was not objectionable on the ground that they were of the nature of a return of capital.

In the present case, we are not dealing with an annuity or an income bought with a sum of money, and of which the annuitant is the purchaser, but we are dealing with instalments due on the purchase price of certain assets. The appellant has bought no annuity subject to income tax.

I would allow the appeal with costs here and below.

RAND J. (dissenting):—This appeal raises the question of the distinction between "annuities or other annual payments received under the provisions of any contract except as in this *Act* otherwise provided" within s. 3(1) (*b*) of the *Income Tax Act*, and instalment payments of capital or of capital and income combined; and it is to be determined by ascertaining the real nature of the payment from the standpoint of the person receiving it.

Perhaps the most familiar use of the word "annuity" envisages the payment of one or more sums of money in return for which an obligation is undertaken to pay an annual or other periodic sum during the lifetime of the purchaser. In that case, the purchase money is properly looked upon as having disappeared, and the annual payments, notwithstanding that they are actually or theoretically built up of the capital and accumulated interest, as neither a return nor a conversion of the money advanced but as income. This idea of "disappearance" is significant in being notional, for as Lord Greene in *Sothern-Smith* v. *Clancy* (1), points out, the payment of money or the transfer of property as consideration for a series of payments "disappears" in every case so far as the person making it is concerned: but the notion of its disappearance is nevetheless relevant to the issue, because it determines the aspect in which the payments are viewed and because it is the manner in which people uniformly and habitually view them that gives rise to the conceptions which underlie the legislation.

That transaction, as a clear example of annuity, on the one hand, is to be contrasted with the sale of land for a price to be paid by equal portions, on the other. In this the

(1) 24 Tax Cas. 5.

vendor views the receipt of instalments, to use the language of Rowlatt J. in *Perrin* v. *Dickson* (1), as "liquidating a principal sum", the price, and that is so even though title has passed and all that remains is the obligation: there is the conception of a conversion of capital from land to money or the payment of a debt. These relatively simple transactions have become complicated by variations in the term and by the introduction of conditions and modifications of the obligation to the extent that they present questions of some difficulty in allocating them to the one or other classification.

The statute does not observe all the possible refinements to which logically that primary contrast could give rise. There is scarcely any form of the receipt of money paid in return for a consideration, which, if we look at its financial facts, could not fairly be argued to possess some increment of returned capital: and there are taxable items under the statute which undoubtedly do that. S. 3(1) (*b*) provides broadly that "annual payments" are to be deemed to be income except as the *Act* otherwise provides: but the *Act* is designed primarily to tax "income" and the exclusion of the receipt of capital generally is basic. Subject, then, to its clear specifications, we should, in the differentiation of annual payments, act upon the common acceptation of these words held in the business world.

In the facts before us, the payments of $1,000 a month for life are part of the consideration for the sale by the taxpayer of a large business to a company, but they relate to no specific portion of the price, and when received, they are not taken as discharging pro tanto any notional, much less, any measured amount of capital. Nor is the total amount to be paid certain; it may be small or large, depending on the uncertain life of the taxpayer.

The question has been elucidated by the recent decision of the Court of Appeal of England, in *Sothern-Smith, supra.* There a life assurance society, in consideration of a specified sum of money agreed to pay to the purchaser a fixed annuity during his life with the added provision that if during that time the payments did not aggregate the sum paid by him, they would continue to his sister until that sum had been reached: in other words, the contract was to

(1) 14 Tax Cas. 615.

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pay an annual sum for an ascertainable period of years or for the period of the life of the purchaser, whichever might prove to be the longer. It was argued that the purchase price continued to persist as a guaranteed return, and that the payments to the sister partook, consequently, of the nature of capital. This contention was rejected. In speaking of an annuity for a term of years and pointing the distinction between that and a life annuity, namely, that in the latter the sum of the payments which fall to be made may be less or greater than the amount paid by the annuitant while in the former it would be the same as that amount plus an addition for interest, Lord Greene, at page 7, observes:—

> I feel bound to regard the purchase of an annuity of the kind to which I have referred as the purchase of an income and the whole of the income so purchased as a profit or gain notwithstanding the way in which the payments are calculated. The sum paid for the annuity has ceased to have any existence and the fact that at the end of the annuity period the recipient will have received an amount equal at least to what he paid I feel bound to treat as irrelevant.

A fortiori, would that reasoning apply to the case of a life annuity as we have it here.

It is then contended that the definition of income in s. 3 makes it clear that when income is associated with capital in a payment only the former is intended to be brought under the charge. It is then assumed that necessarily some part of these annual payments are of a capital nature and to that extent are beyond the tax. The difficulty here is that there is no agreed capital element and we are not at liberty in any manner to capitalize the payments. Under the contract, cash, debentures, shares of stock and two annuities constituted the purchase price. That a person may bargain for a life annuity as part of the consideration for the sale of property, whether or not it is referable to a specific portion of the price, is, I think, unquestionable, and that, in my opinion, is what was done here.

It was argued that the case is governed by *Shaw* v. *The Minister of National Revenue* (1). But the language of s. 3(1) (*b*), as it then was, specifically excluded "payments made or credited to the insured on life insurance, endowment or annuity contracts upon the maturity of

(1) [1939] S.C.R. 338.

the term mentioned in the contract or upon the surrender of the contract." The payments there, under an insurance policy, were directly within that language. Since that decision, the section has been amended to its present form.

It is finally contended that the case falls within subsection (2) of section 3 which provides:—

> (2) Where under any existing or future contract or arrangement for the payment of money, the Minister is of opinion that
>
> (a) payments of principal money and interest are blended, or
>
> (b) payment is made pursuant to a plan which involves an allowance of interest;
>
> whether or not there is any provision for payment of interest at a nominal rate or at all, the Minister shall have the power to determine what part of any such payment is interest and the part so determined to be interest shall be deemed to be income for the purposes of this Act.

The facts of the case as well as the reasoning on which *Sothern-Smith* is based, are, I think, a complete answer to this contention. There is nothing in the agreement on which the Minister could find that payments of principal and interest are blended or that there is any plan which involves an allowance of interest; the annuity is one of a number of items together making up a total price not expressed in a specific amount of money. It is not intended, certainly, that every annuity is to be dealt with under that subsection, but that would seem to me necessarily to follow if the present case were held to be within it.

I would, therefore, dismiss the appeal with costs.

KELLOCK J. (dissenting):—This appeal raises the question as to whether or not the "annuity" of $1,000 per month received by the appellant under the provisions of the agreement of sale of the 6th of February 1932 here in question, constitutes an annuity within the meaning of s. 3(1) (*b*) of the *Income War Tax Act* as it stood with respect to the taxation years 1941, 1942 and 1943.

The agreement provides for the sale by the appellant to Wilder Norris Limited of a substantial list of assets, the consideration being (1) the assumption by the purchaser of all existing debts, liabilities, contracts and engagements of the appellant; (2) the sum of $10,000 in cash; (3) the sum of $1,000,000 in debentures of the purchaser; (4) $100,000 by the allotment to the appellant or

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his nominees of certain shares of the company; and (5) the following:

(b) To pay to the Vendor as and from the first day of December 1931 an annuity during his lifetime of $1,000 per month;

(c) To pay to Mrs. F. E. Puffer, of the City of Montreal, as and from the first day of December 1931, an annuity during her lifetime of $75 per month;

Section 3 of the statute defines income, so far as material, as

The annual profit or gain from any other source, including . . .

(b) annuities or other annual payments received under the provisions of any contract . . .

In *Lumbers* v. *Minister of National Revenue* (1), Hudson J. refers to the difference between the present form of the paragraph and its form at the time judgment in *Shaw* v. *Minister of National Revenue* (2) was given. In his view, and he gave the judgment of the majority of the court, the annuities or other annual payments covered by the paragraph are themselves to be regarded as income, rather than sources from which income may be derived. The question remains, however, as to what is included within the word "annuities" as used in the statute.

It is past question that the statutory definition was not intended to include everything in the nature of "annual payments". For example, annual instalments of the purchase price on the sale of property could not be regarded as income without very plain words, and there are no such words. "Other annual payments" is, I think, to be read *ejusdem generis* with "annuities," and if so, the word "annuities" would appear to be used with respect to payments of an income nature. This view is confirmed upon consideration of paragraph (*g*) of the same subsection which provides that annuities or other annual payments received under the provisions of any estate or trust are taxable "notwithstanding that the annuities or annual payments are in whole or in part paid out of capital funds." If "annuities" simpliciter were taxable, the qualifying words in the paragraph would be unnecessary.

In *Lady Foley* v. *Fletcher* (3), the House of Lords interpreted the words "any annuity or other annual payment . . . by virtue of any contract" in s. 40 of 16 Vict.

(1) [1944] S.C.R. 167 at 172. (2) [1939] S.C.R. 338.
(3) 3 H. & N. 769.

c. 34 by reference to schedule D of that statute which used the following language: "and for and in respect of all interest of money, annuities and other annual profits or gains," and it was held that the section applied only where the annual payment was in the nature of a profit. In the course of his judgment, Baron Watson said at p. 784:

> But an annuity means where the income is purchased with a sum of money, and the capital is given and has ceased to exist, the principal having been converted into an annuity.

This definition has never been departed from in England.

It is perfectly clear upon the authorities that, merely because a payment is described as an annuity, the question as to whether it is to be regarded as capital or income is not thereby concluded. The question in every case is only to be determined upon a careful analysis of the particular contract. In such analysis, the assistance to be gained from the decided cases is thus expressed by Lord Green M.R., as he then was, in *Commissioners of Inland Revenue* v. *36/49 Holdings Limited (in Liquidation)* (1):

> In so far as, in the cases which have been decided, certain of those circumstances have been regarded as of importance, the authorities no doubt are of assistance, because they at any rate go as far as this: They say that elements such as those are elements which may legitimately be taken into consideration; but when you come down to an individual case, taking such guidance as you can on that basis from the authorities and any general expression of principle, the matter must be decided by reference to the circumstances of the particular case.

At p. 182 he had said:

> The true nature of the sum is not necessarily its nature in law, but its nature in business or in accountancy whichever way one like to put it, because from the legal point of view there may be no difference whatsoever as between the parties between a capital and an income sum. It may be totally irrelevant to the legal relationships into which they are proposing to enter.

I therefore turn to a consideration of the authorities.

In *Secretary of State* v. *Scoble* (2), the appellant, having the right, under the contract there in question, to purchase a railway for the value of all the shares of the company, had also the option, instead of paying the gross amount in one sum, of discharging his liability by the payment, for a certain number of years, of an "annuity", the annual payments being calculated with respect to the gross sum and interest at a specific rate. This option was exercised

(1) (1943) 25 Tax Cas. 173 at 185. (2) [1903] A.C. 299.

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and it was held that these annual payments were composed in part of capital and in part of interest, the interest content of each alone being taxable. As expressed by Lord Davey, the one important fact which determined the case was that for the purpose of ascertaining the amount of the so-called annuity, the gross sum payable by the appellant had to be ascertained.

The fact, however, that the purchase price may not, in any given case, be definitely fixed for all purposes by the terms of the contract, does not necessarily indicate that the annual payments are not to be regarded as capital payments. This is well illustrated by the decision in *Commissioners of Inland Revenue* v. *Ramsay* (1). In that case, the respondent agreed to purchase a dental practice for a "primary price" of £15,000. £5,000 was to be paid down, and for a period of ten years the purchaser, who was to carry on the practice, would pay the vendor annually a sum equal to 25 per cent of the net profits. Such payments were to constitute full payment of the balance, regardless of whether they should amount to more or less than £10,000. £5,000 of this balance was to be secured by a charge upon a policy of life insurance on the life of the purchaser, and it was also provided that if the purchaser should die before the expiration of the full period of ten years, the vendor should accept the proceeds of the policy and the annual payments up to that time, in full discharge of all liability under the contract. It was held by the Court of Appeal that the annual payments were capital and not subject to tax. In the course of his judgment, Lord Wright M.R. pointed out that the mere statement in the contract itself that the annual payments should be paid and received as capital sums paid in respect of the "purchase price" was not conclusive of anything. Whether or not they were capital sums had to be determined by a consideration of the substance of the transaction. He approved of the statement of principle laid down by Walton J. in *Chadwick* v. *Pearl Life Insurance Company* (2), as follows:

> It is obvious that there will be cases in which it will be very difficult to distinguish between an agreement to pay a debt by instalments, and an agreement for good consideration to make certain annual payments for a fixed number of years. In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments; in the other there is an agreement for good consideration not to

(1) 20 Tax Cas. 79.

(2) [1905] 2 K.B. 507 at 514.

pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum.

In *Ramsay's* case, the essence of the contract was that it contained a code which, if it operated during the whole ten years, would have the result that the remaining debt of £10,000 would be discharged by payment of a number of instalments which might amount to either more or less than that sum. Lord Wright said that he could not see why a creditor who has sold property "for a particular price" should not, in discharge of that price, agree to accept a fluctuating sum if there are sufficient reasons of convenience or other considerations which make it desirable to adopt that method of payment. In his Lordship's view, the purchase price of £15,000 was

> A figure which permeates the whole of the contract and upon which the whole contract depends.

He therefore thought that the payments in discharge of that sum were all capital payments.

Greene L.J., as he then was, points out that the argument for the respondent was based upon the view that the sum of £15,000 mentioned in the contract had no real existence at all, in the sense that the contract would be exactly the same if all reference to that sum had been omitted. Greene L.J. rejected that argument, being of the view that, upon the contract, the primary obligation was to pay that sum which would only be varied in the events mentioned in the contract.

It has also been held that, merely because the annuity or annual payments constitute part of the price or consideration of a contract does not stamp them as capital payments.

Rowlatt J., in *Jones* v. *Commissioners of Inland Revenue* (1), a case of a contract providing for the payment of a "royalty" on the sale of certain inventions, said at p. 714:

> It has been urged by Mr. Latter that the annual payment now in question being 10 per cent upon the sales of machines for ten years is part of the consideration which was paid for the transfer from the appellant of his property. So it is, but there is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case, regard must be had to

(1) [1920] 1 K.B. 711.

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what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when that is the case the payments to him are not income; *Foley* v. *Fletcher*, 3 H. & N. 769. Or a man may sell his property for an annuity. In that case the Income Tax Act applies. Again, a man may sell his property for what looks like an annuity, but which can be seen to be not a transmutation of a principal sum into an annuity but is in fact a principal sum payment of which is being spread over a period and is being paid with interest calculated in a way familiar to actuaries—in such a case income tax is not payable on what is really capital: *Secretary of State for India* v. *Scoble* (1903) A.C. 299.

There are cases, again, which illustrate that in a particular contract, the consideration on the sale of property may consist in part of capital items and in part of income items, and it is necessary, as in other cases, to ascertain where the line is to be drawn.

In the *36/49 Holdings Limited* case, *ubi cit.*, Lord Greene said at p. 183:

> Now it is plain to my mind that where you have a purchase consideration built up in that way, the fact that some of the elements are of a capital nature does not the least bit point to the periodical payments being also of a capital nature. Then again there are cases in the books where the two elements in the purchase price have appeared, one of a capital nature and one of an income nature. The presence, therefore, of these elements of a capital nature here does not in any way assist me in the problem in which I am engaged.

In *East India Railway Company* v. *Secretary of State* (1), the contract was similar to that in question in *Scoble's* case except that it provided, as to one-fifth of the capital of the vendor company, that the Secretary of State might arrange with the company that these shareholders, called "deferred annuitants," should receive, for a period determinable by the Secretary, interest at 4 per cent per annum on their interest in the capital, and in addition one-fifth of the net profits of the railway, instead of the annual payment of capital and interest to be received by the remaining shareholders. The contract provided that on termination, the deferred annuitants should thenceforth receive the annual payments on the same basis as the other shareholders. It was held that no part of the deferred annuities represented repayment of capital, but that under the arrangement, part of the capital of the annuitants had been used to purchase the right to the interest and profits which they had received. With respect to these shareholders, the consideration was made up in part of

(1) (1924) 40 T.L.R. 231.

payments composed purely of an income nature, namely, interest and profits, and latterly of annual payments composed, as in *Scoble's* case, of both capital and interest.

In the case already referred to, *36/49 Holdings Limited*, the respondent company had sold certain shares belonging to it in another company for a consideration composed of various items including certain sums in respect of each machine which should be sold by the company whose shares formed the subject matter of the contract.

Noting that the payments in question were to be perpetual unless the right given by the contract to commute them were exercised, Lord Greene thought it very difficult to class a perpetual payment under the category of capital, and he added:

> The length of time during which a payment is to endure may be a very important factor in determining its character. It is obviously much easier to treat a payment which is only going to extend over two years as really a payment of purchase price by instalments, than it is to treat a payment which it is contemplated may continue in perpetuity.

He also observed that the sums payable under the subparagraph of the contract with which he was dealing were not tied in any way or related in any way to any special sum whatsoever.

In the case at bar, there is no gross sum mentioned or ascertainable, and the two annuities are not in any way related to any such amount. The annuities are periodic payments, indefinite in number. In my opinion, the present case is essentially of the same nature as the *East India Railway Company* case, where part of the appellant's capital was, on the sale of his assets, used to purchase an income of $1,000 per month, the capital itself ceasing to exist, being converted into an annuity. I do not think it could be suggested, as to the annuity payable to Mrs. Puffer, that the situation was any other than that part of the appellant's capital had been used to purchase an income for her, and there are no indicia, in my opinion, which can properly lead to a different view with respect to the annuity payable to the appellant himself.

The appellant relies upon the decision of the Court of Appeal in *Dott* v. *Brown* (1). The contract in that case provided for the settlement of a debt due from the respondent to the appellant of about £10,000, which had been the

(1) (1936) 154 L.T. 484.

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subject of proceedings in bankruptcy, a compromise having been arrived at which was made an order of the court. Under this compromise, the petitioner agreed to accept "in full satisfaction of his judgment debt" various considerations including items undoubtedly of a capital nature and also the particular item in question, namely, the covenant of the debtor to pay certain annual sums as long as the petitioner should live. In the view of Lord Roche, the stipulation of the petitioner that the plaintiff was "to accept in full satisfaction of his judgment debt" was language applicable to the acceptance of a sum short of the full sum rather than to any contemplated sum larger than the judgment debt being received. Lord Roche was of opinion that it would have been open to the defendant, if he had thought fit, to offer evidence on this point as well as other points as to the surrounding circumstances, to remove this natural inference from the document. No such evidence was offered, and for that reason the *prima facie* construction remained. This circumstance immediately places the case in the category of those to which I have referred in which, in the words of Lord Greene, the repayments were "tied in" to a capital sum. In the case at bar, this element is entirely lacking.

Further, the covenant in *Dott* v. *Brown* was contained in a single clause by which the debtor was "to pay £1,000 on the 31st of March, 1933, £1,000 on the 31st of March, 1934, and £250 on each succeeding 31st of March so long as the petitioner should live." Scott L.J., in coming to the conclusion that the annual payments of £250 were capital payments, was influenced by the fact that, in his view, the two annual payments of £1,000 were clearly capital, and it was to be assumed that the payments of £250, *being contained in the same clause,* were also capital payments in the absence of some reason to the contrary. That this conclusion was not based upon the view that because one finds included in the consideration in a contract, capital items, that fact is of assistance in arriving at the conclusion that other items are also capital, is borne out by the judgment of the learned Lord Justice himself in the *36/49 Holdings Limited* case, where he agreed with the judgment of the Master of the Rolls to which I have already referred on this point. The circumstance to which Scott L.J.

attached importance in *Brown's* case is not present in the case at bar which, for the reasons given, is, in my opinion, quite distinguishable from that case.

There was no objection taken on the part of the appellant upon the ground that the payments in the present case are monthly payments. That point is, in any event, concluded by the decisions in *In Re Cooper* (1) and *In Re Janes' Settlement* (2), both of which have been approved by the Court of Appeal in *Smith* v. *Smith* (3), and I would adopt the reasoning in these judgments.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Walker, Martineau, Chauvin, Walker and Allison.*

Solicitor for the respondent: *E. S. MacLatchy.*

HIS MAJESTY THE KING (PLAINTIFF) ..APPELLANT;

AND

UHLEMANN OPTICAL COMPANY (DEFENDANT) ..... RESPONDENT.

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*Apr. 9, 10, 11, 12.
*Dec. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Patents—Eye-glasses—Two-point Numount mounting—Action for impeachment—Anticipation—Lack of invention—Ambiguity—Commercial success.

Pursuant to s. 60 of the *Patent Act* (S. of C. 1935, c. 32), the Crown, on the information of the Attorney General of Canada, sought to impeach respondent's patent 381,380, covering an invention relating to a mounting means for temples of rimless eye-glasses (spectacles), on the ground that it was invalid for lack of novelty and lack of subject matter. The action was dismissed in the Exchequer Court of Canada.

Held (Locke J. dissenting), that the judgment appealed from be affirmed and the appeal dismissed, since there was no anticipation and since the patent in suit contributed substantially to the solution of the problem of breakage and did involve the taking of an inventive step which the respondent was the first to take.

*PRESENT: Rinfret C.J. and Kerwin, Locke, Cartwright and Fauteux JJ.

(1) 88 L. Jo. ch. 105. (2) (1918) 2 ch. 54.
(3) [1923] P. 191.

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Per Rinfret C.J. and Kerwin, Cartwright and Fauteux JJ.: In an invention which consists in a combination as in the present case, it matters not whether the elements thereof are old and were already known in the art as separate entities, the only point is whether the actual combination is new. The invention lies in the particular combination, provided it is not a mere aggregation or a juxtaposition of known contrivances.

Whether there is invention in a new thing is a question of fact for the judgment of whatever tribunal has the duty of deciding.

Ex post facto analysis of an invention is unfair to the inventors and is not countenanced by the patent law.

Baldwin International Radio Co. of Canada Ltd. v. *Western Electric Co.* [1934] S.C.R. 94; *Samuel Parkes & Co.* v. *Cocker Bros.* 46 R.P.C. 241; *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Braulik* 27 R.P.C. 209 and *Non-Drip Measure Co. Ltd.* v. *Stranger's Ltd.* 60 R.P.C. 135 referred to.

Per Locke J. (dissenting): Since the essence of the alleged invention as disclosed by the evidence lay not in attaching the temple supporting arm to the lens edge engaging portion or shoe of the strap, but rather to the nose-engaging means at the point where the strap was soldered to it, for the very purpose described in the specification of transferring any pressure from the temples to the nose-engaging means and the bridge; and since, having regard to the common knowledge in the art at the time of the alleged invention, there was nothing new in such a construction or in any of the parts or in the idea, the relief claimed should be granted.

The slight change made from the prior disclosure by Savoie in securing the temple-bow holder to the strap by solder rather than to the ear of the strap by a screw, did not involve the exercise of the inventive faculties; the commercial success of the mounting, although extensive, cannot be regarded as in any sense conclusive on the question in view of the evidence of the lack of invention.

Natural Colour Kinematograph v. *Bioschemes Ltd.* 32 R.P.C. 256; *Pugh* v. *Riley Cycle Co.* 31 R.P.C. 266; *Pope Appliance Corp.* v. *Spanish River Pulp and Paper Mills* [1929] A.C. 269; *Crosley Radio Corp.* v. *Canadian General Electric Co.* [1936] S.C.R. 551; *Vanity Fair Silk Mills* v. *Commissioner of Patents* [1939] S.C.R. 245 and *Longbottom* v. *Shaw* 8 R.P.C. 333 referred to.

APPEAL from the judgment of the Exchequer Court of Canada, Thorson P. (1), dismissing the Crown's action for a declaration of invalidity of the respondent's patent 381,380.

E. G. Gowling K.C. and *G. F. Henderson* for the appellant. The patent in suit is attacked on the grounds of anticipation, lack of subject matter and ambiguity.

In construing the prior document to determine if it constitutes an anticipation, the Court has regard to the effect of the disclosure upon one skilled in the art namely one

(1) [1950] Ex. C.R. 142.

who is deemed to be familiar with the common knowledge in the art: *King Brown & Co.* v. *The Anglo American Brush Corp.* (1) and *Gillette Safety Razor Co.* v. *Anglo American Trading Co.* (2). The case of *Rice* v. *Christiani* (3) is also relied upon.

The prior publication must disclose invention claimed to the extent that the skilled technician faced with the problem, would find the answer obvious from examining the document: *Electric and Musical Industries Ltd.* (4). A drawing alone can constitute an anticipatory document.

The claim here is invalid since there is something old within it and since it is not a combination patent within the case of *Baldwin International Radio* v. *Western Electric* (5). The cases of *Smith Incubator Co.* v. *Seiling* (6) and *The King* v. *Smith Incubator* (7) are also relied upon.

It is not essential that the same problem be envisaged in the anticipatory document. It is critical that the construction has been disclosed to and is open to the public to use: *John Summers & Sons Ltd.* v. *The Cold Metal Process Co.* (8).

Applying the foregoing principles, it is submitted that the claims of the patent in suit are anticipated by Stevens U.S. patent 953,304, Savoie U.S. patent 988,666 and Nerney U.S. patents 1,984,541 and 1,987,701.

Even if the prior documents should not be found to constitute an anticipation or a disclosure of the invention, the degree of advance in the art made by the patentee over the disclosures cannot constitute invention. Any difference is in the matter of non-essentials structurally and functionally. Every advance over the prior disclosures cannot constitute invention or the grant of the patent monopoly would arrest rather than encourage development in the arts and science: *British Ore Concentration Syndicate Ltd.* v. *Minerals Separation Ltd.* (9). The cases of *Vanity Fair Silk Mills* v. *Commissioner of Patents* (10) and *Crosley Radio Corp.* v. *Canadian General Electric Co. Ltd.* (11) are relied on as cases dealing with advances which did not

(1) 9 R.P.C. 313.
(2) 30 R.P.C. 465.
(3) [1931] A.C. 770.
(4) 56 R.P.C. 23.
(5) [1934] S.C.R. 94.
(6) [1937] S.C.R. 251.
(7) [1937] S.C.R. 238.
(8) 65 R.P.C. 75.
(9) 27 R.P.C. 33.
(10) [1939] S.C.R. 245.
(11) [1936] S.C.R. 551.

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constitute patentable advance over the prior publication. All the advantages flowing from the alleged invention resulted from features which were old in the art. All that the inventor did was to make a non-essential contribution. The principle enunciated in *Clyde Nail Co.* v. *Rusesll* (1) is applicable. Reliance is also placed on the case of *Morgan & Co.* v. *Windover & Co.* (2).

To the extent that there is a diversity between the claims of the patent in suit and the prior art, it is merely one of form which does not constitute an advance in the art to warrant the grant of a valid patent: *Mauck* v. *Dominion Chain Co. Ltd.* (3). Similarly if the change over the prior art is purely a matter of design, no invention has resulted: *Safveans Aktie Bodag* v. *Ford Motor Co.* (4) and *Wood* v. *Raphael* (5).

It is therefore submitted that the claims of the patent in suit fail to disclose a patentable advance over the Stevens, Savoie and Nerney patents.

It is further submitted that the patent in suit did not lead to an unexpected result or the solution of a long existent problem. There was no evidence of the existence of a problem. Rather than the satisfaction of a long felt want, the patent in suit merely constituted a style change accepted by the public for reasons of commerce rather than invention.

The trial judge placed too much weight on the commercial success of the mounting. The success of the mounting was attributable to causes other than the invention. The case of *Niagara Wire Weaving Co. Ltd.* v. *Johnson Wire Works Ltd.* (6) is relied on. The case of *Western Electric Co.* v. *Baldwin International Radio* (7) at page 595 is relied on to show the danger of looking at the evidence of witnesses on the article in the market rather than looking at the specifications and claims.

The term "lens edge engaging portion of the strap" is ambiguous. It is not defined in the patent. There is no evidence that the phrase has any technical meaning to any one skilled in the art. It would appear to have been a phrase chosen by the inventor and should, therefore, have

(1) 33 R.P.C. 291.
(2) 7 R.P.C. 131.
(3) [1933]Ex. C.R. 120.
(4) 44 R.P.C. 49.
(5) 13 R.P.C. 730.
(6) [1940] S.C.R. 700.
(7) [1934] S.C.R. 570.

been defined with precision by him, if it constitutes the essence of the invention as defined by the trial judge. Uncertainty relating to the meaning of the phrase is particularly objectionable since it relates to the very essence of the invention as found by the trial judge. Moreover, it is an obscurity that could easily have been avoided by a more precise description in the specification. In the circumstances, the principle of the decision in *Unifloc Reagents Ld.* v. *Newstead Colliery Ld.* (1) is applicable. There is an obligation upon the inventor to provide the public with the subject matter of his advance in the art without avoidable obscurity: *Natural Colour Kinematograph Co. Ld.* v. *Bioschemes Ld.* (2).

Christopher Robinson K.C. and *Rusesll S. Smart* for the respondent. Considered by the tests in *Canadian General Electric* v. *Fada* (3) and *Pope Appliance Corp.* v. *Spanish River Pulp and Paper Mills* (4), none of the prior patents or publications is an anticipation of the invention covered by the patent in suit.

As to the propriety of looking at prior patents, the cases of *Non-Drip Measure Co.* v. *Strangers* (5) and *Fiberglas Canada Ltd.* v. *Spun Rock Woods* (6) are cited.

Having regard to the findings of fact by the trial judge, which are fully supported by the evidence, the respondent submits that this case is similar to the cases of *Non-Drip Measure Co.* v. *Strangers* (*supra*) and *Samuel Parkes &* Co. 1. Cocker Bros. (7), and that the mounting of the patent in suit was no mere workshop improvement which was obvious to any workman faced with the problems of the old rimless mountings, but was, on the contrary, an invention.

There was a problem and the existence of that problem plus the commercial success is a strong evidence of an invention: *Longbottom* v. *Shaw* (8), *Howaldt* v. *Condrup Ltd.* (9), *Albert Wood and Amcolite Ltd.* v. *Gowshall Ltd.* (10) and *John Wright and Eagle Range Ltd.* v. *General Gas Appliances Ltd.* (11).

(1) 60 R.P.C. 165.
(2) 32 R.P.C. 256.
(3) (1930) 47 R.P.C. 69.
(4) 46 R.P.C. 23.
(5) 60 R.P.C. 135.
(6) 64 R.P.C. 54.
(7) 46 R.P.C. 241.
(8) 8 R.P.C. 333.
(9) 54 R.P.C. 169.
(10) 54 R.P.C. 37.
(11) 46 R.P.C. 169.

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There is no ambiguity in the expression "lens edge engaging portion". It means the base edge of the U. It is a combination invention and not a new invention in the sense that there are no new parts.

E. G. Gowling K.C. replied.

The judgment of the Chief Justice and of Kerwin, Cartwright and Fauteux JJ. was delivered by

THE CHIEF JUSTICE—This action was instituted under the provisions of Section 60 of *The Patent Act,* S. of C. 1935, c. 32. The information of the Attorney-General of Canada sought to impeach patents 381,380 and 392,449 as well as industrial design registration 58/12138; but the respondent withdrew its defence in respect of patent 392,449 and the industrial design, so that the trial of this appeal relates only to the validity of patent 381,380.

The disclosure of the nature of the invention of the respondent and of the best mode of realizing the advantages thereof is expressed as follows in the specification:

> My invention relates to eyeglasses, and more specifically it relates to a mounting means for the temple.
>
> One of the objects of my invention is to provide an improved temple mounting which prevents strain from being transmitted to the lenses.
>
> A further object of my invention is to provide a temple mounting that requires a minimum amount of labor in attaching the mounting.
>
> A further object of my invention is to provide an improved temple mounting which will be inconspicuous in appearance.
>
> A further object of my invention is to provide an improved temple mounting which will result in a saving of material.

The attacks made on the patent are its lack of novelty (sometimes called anticipation) and lack of invention (usually referred to as lack of subject matter), and the conclusions of the information were that the letters patent be declared invalid or void and that the same be cancelled and set aside.

The specification is dated the 28th day of February, 1938, and the patent was granted to William R. Uhlemann on the 16th day of May, 1939. It was subsequently assigned to the respondent.

The learned President of the Exchequer Court (1) dismissed, with costs, the appellant's action for a declaration of invalidity.

(1) [1950] Ex. C.R. 142.

The learned President arrived at the conclusion, on the evidence submitted by the plaintiff, that it was shown that at an early date efforts were made to improve rimless spectacles. He said:

> The problem was to overcome their defects, namely, the high rate of breakage of the lenses and their tendency to loosening, and at the same time retain their advantageous features, namely, their lightness, wide range of vision and comparative inconspicuousness. The problem was primarily that of breakage and next that of loosening. It was also desired to reduce the inconspicuousness of rimless spectacles still further. There was certainly a clear recognition of the problem to be solved in the specifications of several of the patents such as, for example, the Stayman, Ferris and Nerney patents.

He adds:

> Without discussing the patents in detail, I think that it may fairly be said that up to the time when the defendant's 2-point Numont mounting came on the market no satisfactory solution of the problem had been found.
>
> When the defendant's mounting came into production in 1938 there was an immediate and wide demand for it and it almost swept other types of rimless spectacles mountings off the market. This was admitted by Mr. Elliott for the plaintiff who said that when it first came it was about 90 per cent of the optician's business. Mr. Goodwin for the defendant also stated that it was the greatest revolution in the optical frame business.

The judgment appealed from finds that:

> The evidence establishes that there was no practical contribution to the solution of the problem prior to the 2-point Numont mounting. The inventions covered by the patents (filed as Exhibits) were in the main paper proposals or, where that was not so, had no commercial success.

The judgment also states that:

> The evidence establishes that the 2-point Numont mounting went a considerable distance towards solving the problem to which the inventor had addressed himself. There was really no substantial dispute of this fact;

and that

> the evidence is conclusive that the defendant's mounting made a substantial contribution to the solution of the problem of breakage.

The learned President then addresses himself to the question whether the change from the prior art made by Uhlemann was a patentable invention, and after having stated that "there was no novelty in any of the parts, all of which were well known in the art prior to 1930," he adds:

> So that whatever invention there may be in the defendant's mounting lies, not in any part or parts, but in the manner of attachment of some of them . . . The inventive idea lay in having a mounting in which there

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is a single point connection with the lens and the temple arms are connected at a specific place near the nasal edge of the lens, namely, to the lens edge engaging portion of the strap. It was the essence of the invention to have the temple arms so connected.

Perhaps it may be said at once that counsel for the appellant suggested that the idea so described was not incorporated in the claims at the end of the specification, but the answer of the judgment to that objection was that:

> It is to the securing of the temple arm at the lens edge engaging portion of the strap that all the claims are directed . . . The thread which runs through all the claims is the connection of the temple arm to the lens edge engaging portion of the strap at the nasal edge of the lens. In my opinion, counsel for the defendant has correctly set out the essence of the alleged invention. I do not think that any person skilled in the art who read the specification would have had any doubt about it or how to carry it into effect.

It may be said that, at bar, Mr. Robinson, counsel for the respondent, accepted this interpretation of the claims.

With this interpretation of the specification and of the claims it is clearly shown that Uhlemann's invention consists in a combination and it matters not, therefore, whether, as contended by counsel for the appellant, the elements thereof are old and were already known in the art as separate entities. As was pointed out by this Court in *Baldwin International Radio Co. of Canada Ltd.* v. *Western Electric Co. Inc. et al* (1), "On this branch of the case, viz.: anticipation, the only point is whether the actual combination is new" . . . "It is idle to repeat that anticipation is not established by what may be qualified the 'imaginary assemblage' of separate elements gathered from glosses selected here and there in several and distinct anterior specifications." The invention lies in the particular combination, provided it is not a mere aggregation or a juxtaposition of known contrivances.

We have here a group of co-acting parts achieving a combined result or, as was said in *British United Shoe Machinery Company Ltd.* v. *A. Fussell & Sons Ltd.* (2), "a collocation of intercommunicating parts so as to arrive at (what may be called) a simple and not a complex result." As was found in the *Baldwin* case *supra,* that satisfies the definition of a combination for the purposes of the patent law.

(1) [1934] S.C.R. 94 at 101. (2) (1908) 25 R.P.C. 631 at 657.

After having examined the several prior patents claimed by the appellant to be anticipatory to the patent in issue, the judgment found that no anticipation had been established because none of these anterior patents, for purposes of practical utility, were equal to that given by the patent in suit; that nothing essential to the invention and necessary or material for its practical working and real utility could be found substantially in the prior publications, nor were there in them clear directions to use it in order to produce the particular result brought about by Uhlemann's discovery. In that connection, Lord Dunedin's reference to a "mosaic" in the judgment of the Judicial Committee of the Privy Council in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills, Ltd.* (1) was referred to.

We agree that the judgment appealed from cannot be disturbed on that ground.

That leaves only the issue of subject matter; and the ground upon which it is suggested that the invention in the present case was not patentable is that the advantages "would be obvious as a workshop improvement to a person skilled in the art and did not involve any inventive step."

On that point, the judgment is to the effect that the result accomplished by Uhlemann did involve the taking of an inventive step and that he was the first to take it. That was the finding of the learned trial judge, and with that conclusion we agree. Whether there is invention in a new thing is a question of fact "for the judgment of whatever tribunal has the duty of deciding." (Lord Moulton's dictum, quoted by Terrell on Patents, 7th edition, page 71). The learned author adds:—

> It would seem to be necessary to fix upon some definition of invention, but this has never been done, and in my opinion no definition of invention can be found which is of the slightest assistance to anyone in a case of difficulty . . . When you approach the dividing line it is so impossible to get a test that it becomes, more or less, a matter of personal opinion. Some of the elements of a combination are altered so as to improve, but not essentially change its working. Is that a new invention? If it is only the substitution of mechanical elements which are notoriously the equivalents of the old elements the law is clear, but in any other case it is treated as being a question of fact for the judgment of whatever tribunal has the duty of deciding.

(1) (1929) 46 R.P.C. 23 at 52.

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As Tomlin J. (as he then was) said in *Samuel Parkes & Co.* v. *Cocker Bros.* (1):

> Nobody, however, has told me, and I do not suppose anybody ever will tell me, what is the precise characteristic or quality the presence of which distinguishes invention from a workshop improvement. Day is day, and night is night, but who shall tell where day ends or night begins? . . . The truth is that, when once it had been found, as I find here, that the problem had waited solution for many years, and that the device is in fact novel and superior to what had gone before, and has been widely used, and used in preference to alternative devices, it is, I think, practically impossible to say that there is not present that scintilla of invention necessary to support the Patent.

In *British Westinghouse Electric and Manufacturing Co. Ltd.* v. *Braulik* (2), Fletcher Moulton L.J. remarked that "*ex post facto* analysis of invention is unfair to the inventors, and in my opinion it is not countenanced by English Patent Law."

This was approved by the House of Lords in *Non-Drip Measure Company, Limited* v. *Stranger's Limited et al* (3), where Lord Russell of Killowen remarked:

> Nothing is easier than to say, after the event, that the thing was obvious and involved no invention;

and Lord Macmillan said (at p. 143):

> It might be said *ex post facto* of many useful and meritorious inventions that they are obvious. So they are, after they have been invented.

See, also, the remarks of Fletcher Moulton L.J. in *Hickton's Patent Syndicate* v. *Patents and Machine Improvements Company Ld.* (4):

> To say that the conception may be meritorious and may involve invention and may be new and original, and simply because when you have once got the idea it is easy to carry it out, that that deprives it of the title of being a new invention according to our patent law, is, I think, an extremely dangerous principle and justified neither by reason, nor authority.

We have it, therefore, in the present case that there was a problem to be solved and a want to be supplied. The 2-point Numont mounting made a substantial contribution to the solution of the problem. The commercial success of the invention, if not conclusive, is, at least in this case, an element to establish the clear recognition that the patent in suit met the problem and the want; that the advantages therein involved an inventive step, which

(1) (1929) 46 R.P.C. 241 at 248.
(2) (1910) 27 R.P.C. 209 at 230.
(3) (1943) 60 R.P.C. 135 at 142.
(4) (1909) 26 R.P.C. 339 at 347.

Uhlemann was first to take, and that the appellant's action for a declaration of invalidity was rightly dismissed by the judgment *a quo*.

The appeal should therefore be dismissed, with costs.

LOCKE J. (dissenting):—This is an appeal from a judgment delivered in the Exchequer Court (1) dismissing a claim advanced in His Majesty's name for a declaration that Canadian Patent No. 381,380 issued to one Wm. R. Uhlemann on May 16, 1939, and assigned by the latter to the respondent, be cancelled and set aside. The information filed claimed the same relief in respect of Canadian Patent No. 392,499 and an industrial design registration, but as to these the defence filed was withdrawn and the issues thus restricted to the letters patent first above mentioned.

Of the grounds for the relief claimed disclosed in the amended Particulars of Objection, those principally relied upon were: firstly, that there was no invention, having regard to the common knowledge in the art, and secondly, that the alleged inventions were not new and were known and used by others before the date when the said inventions were alleged to have been made. The patent in question was issued in Canada on the application of Uhlemann on May 16, 1939. In advance of this, however, he had applied on April 22, 1937, for a United States patent and, pursuant to such application, letters patent had been issued relating to the same matter under date of February 22, 1938. In the present proceedings the date of the filing of the application for the American patent is claimed as the date of the invention.

The invention claimed relates to rimless eye-glasses and by the specification it is stated that specifically it relates to a mounting means for the temple. The objects of the invention are stated to be:—

(*a*) to provide an improved temple mounting which prevents strain from being transmitted to the lenses;

(*b*) to provide a temple mounting that requires a minimum amount of labour in attaching the mounting;

(1) [1950] Ex. C.R. 142.

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(c) to provide an improved temple mounting which will be inconspicuous in appearance; and

(d) to provide an improved temple mounting which will result in a saving of material.

and this is followed by a further statement that other objects and advantages of the invention will be apparent from the description and the claims.

The construction in question, to adopt the language of the specification, comprises:

> a pair of channel-like straps having a lens-edge engaging portion with ears extending therefrom for embracing the edges and adjacent surface portions of the lenses, a bridge secured to these straps, a pair of temple-supporting wires having an anchorage portion thereof also secured to the straps, in general extending along, adjacent, and in the rear of the edges of the lenses, and a pair of temples pivotally connected with the ends of the wires, the axes of said hinge connections being substantially vertical, whereby the temples will fold compactly.

This description does not include any reference to nose guards, an essential part of any such construction, but later in the specification it is said that "the usual nose guards are secured to the straps in any suitable manner."

The straps so called are in general small "U" shaped pieces of metal designed to receive the edge of the lens, the ears or sides engaging the surface of the lens and the inner bottom portion or shoe bearing against the edge. The lens is secured in this position either by means of a screw passing through both ears of the strap or by cement, or by so constructing the inner surface of the ears as to cause them to engage slots cut into the side or the edge of the lens for that purpose. Samples of rimless spectacles said to have been made in accordance with the specification of the patent were filed at the trial. It is not apparent from the exhibits filed as to the exact manner in which the mountings are put together. In the exhibit marked 31 (but which, it would appear from the evidence, was exhibit 30) the inner extremity of the so-called temple-supporting wires, the metal portion which carries the nose guards, the outer side of one ear of the strap and the bridge appear to be soldered together. In this exhibit the metal portion carrying the nose guards does not appear to be an integral part of the bridge, but in Exhibit H, produced by Uhlemann and also said to be made in accordance with the specification, the bridge and the metal portion supporting the nose

guards appear to be one unit, to which the rear of the shoe of the strap and the temple-supporting wires are soldered. It is, in my opinion, unfortunate, in view of the nature of the issues, that the witness Uhlemann did not disclose the manner in which exhibits 30 and 31 were assembled, these apparently being the mountings which are commonly in use. The witness Elliott, an optician and optometrist of long experience, called on behalf of the plaintiff, said in reference to Exhibit 30 (incorrectly referred to as Exhibit 31 in the evidence) that it looked as if the temple arm was soldered to the base of the "U" from which the straps project and to the nose guard arm and the base of the bridge. In view of the great importance said to attach to the fact that the temple arm was attached to the "lens engaging portion of the strap", it would have been helpful if Uhlemann, who presumably knew, had dealt with the matter.

Further statements in the specification illustrated by reference to the drawings filed with it were to the effect that the temple-supporting wires were secured to the "lens-edge engaging portion of the lens-supporting strap" in the construction shown in two of the drawings, and again that it was secured, as shown in another of the figures "in the plane of the lens-edge engaging portion thereof as by welding, soldering, or the like." Again referring to two of the illustrative figures it is said that the straps are secured in any suitable manner as by soldering or the like to the wire adjacent the junction of the bridge and the temple-supporting wire, and that:

> The temple-supporting wires extend from the portions secured to the lens-engaging portions rearwardly and angularly to follow the contour of the lens adjacent to and along the rear surface thereof.

which may perhaps be intended to indicate a direct physical connection between the temple-supporting wire and a portion of the strap. These various descriptions of the nature of the mounting conclude with the following paragraph:

> It will be seen that in all of the forms disclosed the temple-supporting wire follows the contour of the edge of the lens so as not to interfere with the vision and so as to be inconspicuous. It will also be noted that in all of the forms the temple-supporting wire is supported by the nose-engaging means.

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Before discussing the claims it should be noted that the practice of affixing the lenses in rimless spectacles by the use of straps of the nature referred to by Uhlemann in his specification was not new. In early types of such spectacles the inner edges of the lenses were secured by these straps which were soldered to the bridge or to the nose guards, while the spectacles were held in place by wires extending rearward which were attached by similar straps to the upper and outer edges of the lens and which engaged the ears of the wearer. The types of spectacles theretofore commonly in use employed frames in which the lenses were held and the elimination of such frames obviously produced problems in breakage, which was much less with the older type of framed spectacles. An examination of these early types of rimless glasses employing the above described method of holding them in place upon the nose makes it perfectly apparent that outward pressure upon the wires which engaged the ears would endanger the lens at the point where the straps were attached and cause breakage. Since of necessity a firm bridge and nose pieces of the nature referred to in Uhlemann's specification as the "nose-engaging means" were necessary component parts of any rimless spectacles, these obviously afforded the only point where the temple-supporting wires could be attached if direct strain upon the lenses, by reason of the movement of such wires and their temple-bows or extensions which engaged the ears of the wearer, was to be avoided. While to attach the temple-supporting wire directly to the inner side of the lens in the immediate proximity of the strap attached to the bridge, or the metal of the nose-engaging portion, might reduce the danger of breakage from pressure from the temple wires, some risk would undoubtedly remain.

Uhlemann made six claims for his invention, these being in the following terms:

1. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured directly to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

2. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured directly to the lens-edge engaging portions of the strap intermediate the ends thereof and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

3. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a wire bridge member connecting said straps, and a pair of temple-supporting wire members each being formed integrally with said wire bridge member and being secured to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom to follow the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

4. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps having a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom parallel to the lens-edge engaging portion of said channel-like straps and being secured directly to said straps, there being offsets extending from said portions in the direction of the lenses, said temple-supporting wire members extending from said offset portions and following the contour of the lens adjacent to and along the rear surface thereof for connection with the temple of the spectacle.

5. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edge of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each being secured to the lens-edge engaging portions of the strap and extending rearwardly and angularly therefrom and following the contour of the lens adjacent to and along the rear surface thereof for a substantial distance, the free end portions of said temple-supporting wire having a rearwardly extending portion terminating in a hinge for pivotally receiving the temple of the spectacle.

6. A spectacle construction comprising a pair of lenses, a pair of channel-like straps embracing the edges of said lenses, respectively, at the nasal edges of the lenses, each of said straps including a lens-edge engaging portion, a bridge member for connecting said straps, and a pair of temple-supporting wire members each having an anchorage portion extending therefrom and being secured to said straps in the plane of the lens-edge engaging portions thereof, said temple-supporting wire member extending therefrom to follow the contour of the lens adjacent to and along the rear surface thereof for connection with the temples of the spectacles.

In each of the claims the shoe of the strap is referred to as "the lens-edge engaging portion." The portion of the shoe which engaged the edge of the lens was of necessity

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the inner portion forming the base of the "U". Obviously the expression could not refer to this portion of it. Presumably what was intended to be indicated was the exterior of the shoe and in claims 1, 2 and 3 the construction described involves an anchorage portion extending from the temple-supporting wire being secured directly to the lens-edge engaging portion of the strap. Claim 4 describes the temple-supporting wire members as each having an anchorage portion "extending therefrom parallel to the lens-edge engaging portion of said channel-like strap and being secured directly to said straps," but does not specify whether the attachment shall be to the shoe or to the ear of the strap. In Claim 5 there is no reference to an anchorage portion of the temple-supporting wire, the connection being described as directly between the temple-supporting wires and the shoe of the strap. In Claim 6 the temple-supporting wire members are described as each having an anchorage portion "secured to said straps in the plane of the lens-edge engaging portions thereof", which apparently contemplates that the attachment may be to one or other of the ears of the strap.

Reading the claims together with the specification that:

> in all of the forms the temple-supporting wire is supported by the nose-engaging means.

the inventor sought by attaching the temple-supporting wire at some point on the strap, which strap in turn was connected by solder or otherwise to the metal of the nose-engaging means, to transfer the pressure to this portion of the structure and avoid any pressure on the lens itself.

The idea of a construction in which the pressure from the temple-supporting wires was exerted upon the bridge rather than upon any part of the lens was far from new. On July 14, 1908, Joseph Savoie applied for a United States patent, for improvements in the class of spectacles having frameless or rimless lenses described in the third of his claims as being:

> the combination with a pair of frameless lenses and a central nose-piece having said lenses mounted therein, of a pair of suitably bent resilient holding wires rigidly secured to the rear portion of the nose-piece and extending outwardly therefrom in a plane substantially parallel with that of the lenses, and means connected with the free ends of said holding wires adapted when in use to engage the head of the wearer.

A patent was issued for the invention on March 16, 1909.

On February 23, 1909, Savoie applied for a Canadian patent for a structure of almost identical form, except that the wires which connected with the temple-supporting wires and extended rearward to engage the ears of the wearer were of more rigid construction than those described in the American application. Spectacles said to have been constructed in accordance with the specification of Savoie's American patent were filed as exhibit A at the trial and show the temple-supporting wires as being rigidly affixed to the bridge in a manner rendering it impossible that any pressure from the temple wires could be transmitted to the lenses. The latter were secured in straps similar to those employed by Uhlemann and which were either an integral part of the bridge or soldered to portions of the bridge projected forward to the point where the temple-supporting wires were connected.

By an application for a United States patent filed February 19, 1910, Savoie applied for a patent for an improvement in frameless spectacles, the object of which was to produce an improved temple holder constructed so as to be:

> easily, quickly and firmly attached or fixed to the usual or ordinary nose-piece, and also capable of being as readily disconnected from it.

In the explanatory part of the specification the following appears:

> By means of my improvement herewith frameless spectacles as usually constructed, that is, spectacles having the temple-bows jointed to the lenses, may be quickly and cheaply converted into spectacles having, when in use, the general appearance of frameless eye-glasses. That is to say, the temple-bow members will then be jointed to bent wire holders having enlarged head portions superimposed upon and conforming to the back faces of the rear straps or ears of the well-known nose-pieces as devised for frameless spectacles, all the members being secured together by means of the usual fastening screw.

Uhlemann's "temple-supporting wire member" was described by Savoie as a "temple-bow holder" and the first of his claims which were allowed describes the invention thus:

> The improved one-piece temple-bow holder member herein described, comprising a curved shank or body part having one end constructed for a co-operative engagement with a temple-bow and having the other or head end portion of the member elongated and extending inward toward the other end of the holder, its wall being quite thin and resilient and concave-convex in form cross-sectionally and adapted when in use to bear against and cover the outer or convex face of an elongated aperture ear or strap of a nose-piece, the said head part having a hole therethrough registering with that of the ear for receiving the usual holding screw.

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The drawings attached to the application show the temple-bow holder member fitted over the exterior of the ear of a strap similar to that used by Uhlemann and secured by the screw which secured the lenses in the strap. There was no contact in this construction between the temple-bow holder member and the lens. The strap appears to have been either part of the bridge or attached to it, as in the case of Uhlemann, by solder. It will be observed that this connection, like that described in Claim 6 of Uhlemann's patent, was "in the plane of the lens edge engaging portion" of the strap. The method of attachment to be employed in the structure described in Claim 6 of Uhlemann is not, however, specified.

On October 11, 1909, Frederick A. Stevens applied for a United States patent for improvements in frameless spectacles, a patent issuing pursuant to the application of March 29, 1910. Stevens' structure employed a wire member similar to Savoie's temple bow-holder which followed generally the lines of the lower edges of the lens rather than the upper, as in the case of Savoie's design. The nose-piece was provided at each end with straps into which the lenses were fitted and the connection between the wire members, according to the specification, was as follows:

> In the present invention the bent connection or member (the temple-bow holder) is constructed and adapted to be readily positioned with respect to the lens and nose-piece while at the same time being secured to the lens and practically interlocking with the nose-piece, thereby, in co-operation with the lens-screw, serving to maintain the several parts in position.

and further:

> The inner end portions of said member are enlarged so as to provide a substantially flat thin head, adapted in use to register with the integral ear or ears of the nose-piece and also to lay flatwise snugly against the rear side of the lens. In Figs. 1 to 4 the said head portion is represented as having an open transverse notch or recess formed between the upper and lower lugs shaped to receive therein the adjacent shank part of the nose-piece.

In Stevens' construction, while apparently the head of the temple-supporting wire or temple-bow holder was in direct contact with the side of the lens at the point of attachment, it also was designed to engage the shank part of the nose-piece. As in the case of Savoie's design, a screw was employed which passed through the ears of the strap and the head of the supporting wire and the lens, to secure the latter in its place.

Evidence as to other patents obtained after those of Savoie and Stevens and in advance of that obtained by Uhlemann was given on behalf of the Crown but, in my opinion, it is unnecessary to deal with these in detail to dispose of the issues in the present action. Of these, the United States patent obtained by Ferris on September 4, 1934, one of the objects of which was stated to be the provision of a mounting adapted for use in spectacles for eliminating strain upon the lenses, in which the temple-bows or wires which engaged the ears of the wearer were attached at either extremity of the bridge or an extension thereof and the lenses were secured from above in straps attached to the bridge, and that granted to Bishop in the United States on March 26, 1936, may be mentioned. Bishop's construction differed from that of Ferris in that, while the temple-bows were affixed in like manner to the extremities of the bridge or an extension of it and the lenses were similarly affixed in straps soldered to the bridge, the nose guards were affixed to the lenses by straps rather than to the bridge, as contemplated by Ferris.

Considering first the contention of the plaintiff that there was no invention, having regard to the common knowledge in the art. *The Patent Act 1935,* s. 2(*d*), defines invention as meaning:

> any new and useful art, process, machine, manufacture or composition of matter, or any new or useful improvement in any art, process, machine, manufacture or composition of matter.

S. 26 provides that, subject to certain defined terms, a patent may issue to an inventor of an invention which was, *inter alia,* not known or used by any other person before he invented it. S. 35 requires the applicant, by his specification, to correctly and fully describe the invention and its operation or use as contemplated by the inventor and set forth clearly the method of constructing the machine or manufacture in "such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it." In *Natural Colour Kinematograph* v. *Bioschemes Ld.* (1), Earl Loreburn, dealing with the duty of a patentee to state clearly and distinctly either in direct words or by clear and distinct

(1) (1915) 32 R.P.C. 256 at 266.

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reference the nature and limits of what he claims, said that if he uses language which when fairly read is avoidably obscure or ambiguous the patent is invalid, whether the defect be due to design, or to carelessness or to want of skill. In the present matter, the expression "lens-edge engaging portion of the strap" used both in the specification and the claims is, in my opinion, ambiguous in the sense of being capable of more than one meaning, as has been pointed out above. While the objection of ambiguity is made against both the specification and the claims, it appears to me unnecessary to consider the point since, even if it be given the meaning apparently adopted by the defendant as describing the rear of the shoe, the patent cannot, in my opinion, be sustained.

The learned President of the Exchequer Court (1) in his judgment at the trial has found that the inventive idea lay in having a mounting in which there was a single point connection with the lens and the temple arms were connected at a specific place near the nasal edge of the lens, namely, to the lens-edge engaging portion of the strap, it being of the essence of the invention that the temple arm should be so connected. In view of the statement in the specification that in all of the forms exhibited by the illustrations and referred to in the specification the temple-supporting member is to be supported by the nose-engaging means, and of the fact that the outer portion of the case of the strap is soldered to the nose-engaging means, it is necessary to examine with some care the evidence of the manner in which this so-called invention has been used in practice, since the manner of its use should lead to a sound conclusion as to what was the essence of the invention.

Four exhibits were filed at the trial and numbered 30, 31, 32 and 36 and it is common ground that these illustrated the manner in which Uhlemann's invention was put to use. In the exhibit marked 30 the lens-edge engaging portion of the strap, which I will continue to refer to hereafter as the shoe, consists of a narrow piece of metal approximately three-eighths of an inch in length, the inner portion of which engages, and is the only part that engages, the edge of the lens. The only evidence given at the trial as to the manner in which the mounting was assembled is that of Elliott,

(1) [1950] Ex. C.R. 142.

which is above referred to, but an examination of the exhibit shows that there is no connection between the temple-supporting arm and the shoe. In the case of the exhibits marked 31, 32 and 36, the shoe consists of three small thin pieces of metal of differing lengths, the longer of which is approximately three-eighths of an inch in length and the shorter of which bears against and is attached to or constitutes the bottom of the "U" shaped strap. In none of these exhibits is the temple-supporting arm attached to the shoe. In the absence of any evidence on the point, and Uhlemann apparently decided to give none, it is necessary to rely on what is disclosed by an examination of the three exhibits, and in each of them the temple-supporting arm appears to be soldered to the side of one of the straps and at the same point to the metal of the nose-engaging means.

Uhlemann gave evidence at length at the trial and a fifth exhibit marked "H" was introduced during his examination-in-chief and his evidence directed mainly to it. In this exhibit the strap differed materially from those used in the mountings theretofore produced, being apparently of solid construction, the ears being in breadth practically double their length and the shoe being of the same breadth as the ears. According to Uhlemann, this type of strap was made in accordance with a patent developed by his father some fifteen years ago and was so constructed that diagonally angled slots within the lens engaged lugs inside the strap, creating a dove-tail construction and this eliminated the necessity of drilling a hole in the glass. In this exhibit the temple-supporting arm is soldered both to the side of one ear and the rear of the shoe of the strap as well as to the metal of the nose-engaging means, which is an integral part of the bridge. According to Uhlemann, straps of this nature have not been sold "except through our own distribution," and in cross-examination he said that they did not go into general use. The spring type of straps, as used in Exhibits 31, 32 and 36, he said, were acknowledged to be a better construction and tended to reduce breakage.

It is, in my opinion, the only proper inference to be drawn from the evidence that the method of attachment of the temple-supporting arm to the so-called nose-engaging means shown in Exhibits 30, 31, 32 and 36 show the manner in which the mounting described in the patent has been put

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to use. With great respect for the contrary opinion of the learned President of the Exchequer Court, this demonstrates, in my opinion, that the inventive idea, if there was one, lay not in attaching the temple-supporting arm to the shoe of the strap but rather to the nose-engaging means at the point where the strap was soldered to it, for the very purpose described in the specification of transferring any pressure from the temples to the nose-engaging means and the bridge.

In order to determine whether Uhlemann's construction was new, it is necessary to determine what was the state of the public knowledge on April 22, 1937. Savoie had in July 1908 obtained his patent for a form of mounting in which the temple-supporting wires were attached to a projection from the bridge, and in 1909 had obtained a Canadian patent. In 1910 he had obtained his United States patent for the construction above described, in which the temple-supporting wire was secured to the exterior of the strap. In both of these mountings the pressure from the temples was conveyed to the bridge and diverted from the lens. These patents were, in my opinion, for combinations and, as said by Lord Moulton in *Pugh* v. *Riley Cycle Co.* (1), the publication of a proper and sufficient specification of an invention of a combination is a publication of each subordinate integer of that combination. From the moment of its publication, each subordinate integer therefore passes into the domain of public knowledge as fully and as certainly as does the whole combination of which they are parts. Uhlemann by his specification said that his construction provided a pair of temple-supporting wires having an anchorage portion thereof secured to the straps, and that in the construction shown in his Figures 1 to 3 the supporting-wire was secured to the lens-edge engaging portion of the lens supporting strap, while in Figure 6 it was secured to the rear edge of the strap in the plane of the lens-edge engaging portion. It is only in Claims 1, 2, 3 and 5 that the temple-supporting arm is stated to be attached to the shoe of the strap. Claim 4 refers to the anchorage portion of the temple-supporting wire as being secured directly to the straps, while Claim 6 adopts the language of the specification in saying that the

(1) (1914) 31 R.P.C. 266 at 277.

anchorage portion is "secured to said straps in the plane of the lens-edge engaging portion thereof." The manner of attachment employed in actual use, as shown by the exhibits, is that described in Claim 4 and appears to me to fall within the language of the specification. How soldering the temple-supporting wire to the shoe, which was in turn soldered to the metal of the nose-engaging means, could be more effective in diverting pressure from the lens than soldering it to the side of the ear of the strap and to the nose-engaging means is not explained. The manner in which the mounting was put to use and continues to be used shows conclusively, in my opinion, what was the essence of the so-called invention. The learned trial judge has found that there was no novelty in any of the parts, all of which were well-known prior to 1930, and that the desirability of having a single point connection with the lens and the temple arms connected somewhere near the nasal edge of the lens was not new. It may also be said that the idea of attaching the temple-supporting wires in a manner which would transmit the pressure from the temple-bows to the bridge was not new, having been disclosed in both of Savoie's patents.

The change made by Uhlemann from Savoie's construction disclosed in the 1910 patent was to secure his temple-bow holder to the strap by solder rather than to the ear of the strap by a screw. According to the witness Uhlemann, while he had not constructed a mounting according to Savoie's 1910 patent, in use there would have been difficulty caused by the strain on the temple-bow holder loosening the screw. Was it invention to guard against any such movement by attaching the temple-bow holder to the side of the strap in this manner to prevent this? In *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills* (1), Viscount Dunedin said that what constituted invention was finding out something which has not been found out by other people. It was Savoie's idea that the strain from the temples should be transmitted to the bridge by attaching his temple-bow holder either in the manner disclosed by his 1908 or 1910 patent. The strap to one ear to which Savoie secured his temple-bow holder in his 1910 patent was either a part of, or soldered to, the bridge, as

(1) (1929) A.C. 269 at 280.

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Locke J.

was that of Uhlemann. Both constructions transferred the pressure from the temples to the bridge. Did the slight change made involve the exercise of the inventive faculties, or can it be said that it showed a degree of ingenuity which must have been the result of thought and experiment (*Crosley Radio Corporation* v. *Canadian General Electric Company* (1), Rinfret J. at 556). In my opinion, Uhlemann's construction was merely an application of the ideas disclosed by Savoie "which anybody familiar with and skilled in the art might be expected to arrive at without the exercise of invention in the sense of the patent law", to adopt the language of Sir Lyman Duff C.J. in *Vanity Fair Silk Mills* v. *Commissioner of Patents* (2).

Much was made at the trial of the success in the market of mountings made in accordance with Uhlemann's patent. That, of course, is a matter to be taken into consideration but, as pointed out by Lord Herschell in *Longbottom* v. *Shaw* (3), it is obvious that it cannot be regarded as in any sense conclusive on the question we are here considering. That mountings made in accordance with Uhlemann's patent were very extensively sold is undoubted but this is not to say that the advance made on previous knowledge has been sufficient to constitute invention. In my humble opinion, the contrary is established by the evidence in this case.

I would allow the appeal and direct that judgment be entered for the plaintiff in the action for the relief claimed in the information, with costs in both courts.

Appeal dismissed with costs.

Solicitors for the appellant: *Gowling, MacTavish, Watt, Osborne & Henderson.*

Solicitors for the respondent: *Smart & Biggar.*

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(1) [1936] S.C.R. 551. (2) [1939] S.C.R. 245 at 246.
(3) (1891) S R.P.C. 333 at 336.

ABBÉ PAUL EMILE MORIN (DEFENDANT) ..... APPELLANT

1951
*Nov. 12
*Dec. 3

AND

ALBERT FORTIN (PLAINTIFF) ..... RESPONDENT

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Error in computation made in court below of amounts claimed—Amount in controversy less than $2,000—Whether final judgment—Other remedy available—The Supreme Court Act, R.S.C. 1927, c. 35, s. 36—Arts. 546, 1248 C.P.

During the hearing, it was disclosed that, due to an error made in the Court appealed from in the computation of the various amounts claimed, the amount involved in the action including interest, was not over $2,000. No leave to appeal having been previously asked,

Held, that, without determining whether this Court has jurisdiction, the case should be returned to the Court of Appeal for final determination of the amount, notwithstanding that the judgment has been entered in the register of that Court. Another remedy is still available to the parties (*Major* v. *Town of Beauport* [1951] S.C.R. 60).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) reversing the decision of the trial judge and maintaining the action for damages as the result of a collision between two motor vehicles.

Jacques de Billy, K.C., for the appellant.

Arthur Bélanger, K.C., for the respondent.

The judgment of the Court was delivered by

TASCHEREAU, J.—Le demandeur-intimé réclame du défendeur-appelant la somme de $3,500.00, dommages lui résultant d'un accident d'automobile, survenu sur la route Jackman-Lévis. M. le Juge Gibsone, devant qui la cause s'est instruite à Québec, a rejeté l'action. La Cour d'Appel (1) l'a accueillie, et a accordé au demandeur un montant de $2,424.01.

La cause a été plaidée devant cette Cour, et de part et d'autre les parties ont assumé que nous avions juridiction pour l'entendre, vu que le montant en litige était apparem-

*PRESENT: Rinfret C.J. and Taschereau, Rand, Locke and Fauteux JJ.

(1) Q.R. [1951] K.B. 78.

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Taschereau J.

ment supérieur à $2,000.00. Au cours de l'argument cependant, il a été révélé qu'il y avait eu erreur dans la computation des chiffres en Cour d'Appel, et l'appelant aussi bien que l'intimé s'entendent sur ce point.

L'erreur provient du fait que la Cour d'Appel, se basant sur les chiffres du demandeur, non contestés par le défendeur, a tenu compte des items suivants:—

Perte de salaire du demandeur.....	$	378.00
Perte de salaire de la femme du demandeur..		175.00
Incapacité du demandeur		200.00
Incapacité de son épouse		500.00
Total	$	1,153.00
Comptes de médecins, hôpitaux, automobiles, garages, etc., produits en liasse.....	$	1,271.01
Grand total	$	2,424.01

Or, il arrive que l'addition de ces divers items n'est pas exacte, car les comptes de médecins, hôpitaux, automobiles, garages, ne forment pas un total de $1,271.01 mais seulement de $657.01. Il résulte que le montant véritable des dommages subis, n'est pas de $2,424.01 mais bien de $1,810.01. Même, si l'on ajoute l'intérêt à cette somme, tel qu'autorisé par l'article 43 de *l'Acte de la Cour Suprême,* elle serait encore insuffisante pour conférer juridiction à cette Cour, car elle se trouve inférieure à $2,000.00.

L'article 36 de la *Loi de la Cour Suprême du Canada* se lit ainsi:—

> Sous réserve des articles quarante et quarante-quatre, il peut être interjeté appel à la Cour Suprême du Canada *d'un jugement définitif* ou d'un jugement accordant une motion de non-lieu (nonsuit) ou ordonnant un nouveau procès, de la plus haute cour de dernier ressort dans une province, ou de l'un de ses juges, prononcé
>
> *a*) Dans une procédure judiciaire où le montant ou la valeur de la matière *en litige dans l'appel dépasse deux mille dollars.*

Il est plus que douteux que la juridiction de cette Cour soit subordonnée à une erreur de calcul, *reconnue par tous,* surtout quand l'intention du tribunal dont le jugement est frappé d'appel, est aussi manifeste que dans le cas qui nous occupe. D'un autre côté, un jugement a été effectivement rendu par la Cour d'Appel pour la somme de $2,424.01, en vertu duquel le demandeur peut apparemment exécuter pour ce montant.

Il ne me semble pas nécessaire cependant, de déterminer si oui ou non, cette Cour a juridiction, car un autre remède appartient aux parties. C'est à elles qu'il incombe avant de venir devant cette Cour, de faire déterminer le jugement final. Ce pouvoir appartient à la Cour d'Appel, dont la juridiction à cet égard n'est pas épuisée, même si le jugement est enregistré.

Comme il a été décidé déjà dans une cause de *Major* v. *La Ville de Beauport* (1), la Cour Suprême n'accorde la permission d'appeler, que lorsque tous les moyens ont été épuisés dans la province pour obtenir une détermination finale. Il doit en être ainsi dans le cas qui nous est présenté. Il ne s'agit pas évidemment d'une demande de permission d'appeler, mais on peut dire par analogie, je crois, que lorsqu'il s'agit d'une erreur de calcul, qui affecte notre juridiction, tous les recours que la loi donne aux parties pour la rectifier, doivent être exercés devant la plus haute cour provinciale, où jugement peut être rendu, avant que nous ne soyons saisis de plano du litige, à moins que le droit d'appel n'existe indépendamment de cette erreur. Autrement, il ne s'agirait pas d'un jugement dont la "finalité" est l'une des conditions essentielles à notre droit statutaire et par conséqueunt restreint, d'en prendre connaissance.

Le *Code de procédure civile* pourvoit à la correction des erreurs cléricales. L'article 546 nous dit:—

546. Le juge peut, en tout temps, à la demande d'une des parties, corriger les erreurs cléricales entachant un jugement.

Et l'article 1248, placé dans le chapitre relatif à la Cour d'Appel, se lit ainsi:—

1248. *La Cour d'Appel peut exercer tous les pouvoirs nécessaires* à sa juridition, et rendre les ordonnances qu'elle juge convenables pour suppléer aux défectuosités du dossier, pour arrêter toute procédure en cour inférieure dans une cause portée en appel, pour régler les cas où un cautionnement doit être donné ou renouvelé, *et pour prévoir à tous les cas où la loi ne fournit pas un remède spécifique à la partie.*

Ainsi qu'on peut le voir, la Cour d'Appel est revêtue de pouvoirs très vastes pour remédier à la situation. Si en vertu de l'article 546 C.P., un seul juge de la Cour Supérieure peut corriger une erreur cléricale entachant l'un de ses jugements, il me semble évident que la Cour d'Appel est investie des mêmes pouvoirs.

(1) [1951] S.C.R. 60.

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Évidemment, la Cour Suprême du Canada pourrait corriger une erreur cléricale dans une cause dont elle serait légalement saisie, mais avant de l'être, elle n'a pas plus de juridiction pour le faire, que pour déterminer finalement l'issue du litige.

La conclusion qui logiquement s'impose, est que le dossier doit être retourné à la Cour d'Appel du District de Québec, afin que le montant soit établi par ce tribunal. C'est après cela seulement qu'il sera possible de constater s'il s'agit d'un jugement dont le montant en litige dépasse $2,000.00, l'une des conditions essentielles à notre juridiction. Dans l'intervalle, la cause sera mise hors du délibéré, avec permission aux parties de revenir devant cette Cour pour détermination finale de leurs droits sur le présent appel et adjudication sur les frais de cette ordonnance.

Solicitors for the appellant: *Gagnon & de Billy.*

Solicitor for the respondent: *Arthur Bélanger.*

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*June 4
**Oct. 2
*Oct. 12

JOHN CLAY ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal Law—Theft—Receiving—Retaining—Recent Possession—Whether where explanation rejected but accused acquitted of receiving conviction on retaining charge maintainable—Whether doctrine of recent possession applies to retaining—Cr. Code s. 399.

The accused was charged with (*a*) receiving and (*b*) retaining stolen goods knowing them to be stolen. The evidence established that the goods were found in the recent possession of the accused. He gave no evidence but his wife, called as a witness on his behalf, gave an explanation as to how the goods came into her husband's possession. The trial judge, sitting without a jury, found that the explanation was not a reasonable one but acquitted the accused on the receiving charge and convicted him on the charge of retaining. An appeal to the Ontario Court of Appeal was dismissed but leave to appeal to this Court was granted on the following questions of law: (*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods; (*b*) The learned trial judge having acquitted the accused

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

***Reporter's Note*—The appeal was argued on June 4, 1951 before Kerwin, Kellock, Estey, Locke and Fauteux JJ. By order of the Court it was re-argued before the full bench on Oct. 2.

on a charge of receiving could not in the circumstances of the case convict him on a charge of retaining; (c) An accused person cannot be convicted of both of the offences of receiving and retaining.

Held: Rinfret C.J., Rand, Kellock, Estey, Locke and Cartwright JJ., (Kerwin, Taschereau and Fauteux JJ. dissenting):

1. The appeal should be allowed.

2. An accused person cannot be convicted both of receiving and of retaining. *R.* v. *Yeaman* 42 Can. C.C. 78; *R.* v. *Searle* 51 Can. C.C. 128; *Frozocas* v. *The King* 60 Can. C.C. 324; *Ecrement* v. *The King* 84 Can. C.C. 349.

3. The accused having been acquitted on a charge of receiving, could not in the circumstances of the case be convicted of retaining.

Per Rand, Kellock, Locke and Cartwright JJ. The accused having been acquitted on the receiving charge it was for the Crown to establish subsequent guilty knowledge which it failed to do. There was accordingly no evidence or no sufficient evidence upon which a charge of retaining could be supported.

Per Kerwin J. *contra.* The rejection of the explanation permits the doctrine of recent possession to apply to the charge of retaining. Not only was there evidence to determine that the explanation was not reasonable but it appeared that was the only proper conclusion.

Per Taschereau and Fauteux JJ. *contra.* In acquitting the accused on the charge of receiving the trial judge said he did not accept the explanation and therefore the presumption was not rebutted and it was open to him to decide as he did.

Held: also, Rinfret C.J. Kerwin, Taschereau, Estey and Fauteux JJ., (Rand, Kellock, Locke and Cartwright JJ. dissenting). The doctrine of recent possession applies to a charge of retaining. *The King* v. *Lum Man Bo* 16 Can. C.C. 274; *Lopatinsky* v. *The King* [1948] S.C.R. 220.

Per Taschereau and Fauteux JJ. S. 399 provides for two distinct offences "receiving" or "retaining" *knowing* it to have been so obtained. It matters not then *since when* on a charge of retaining, or *how long after* on a charge of receiving, the guilty knowledge co-exists with possession, provided it does at any time during retention on the former, and at the time of reception on the latter. To import into the section any question as to the duration of the guilty knowledge is to add to the word "knowing", the most essential word in the entire section, a qualification expressly rejected from the provision by the very word itself.

Per Estey J. The language adopted by Parliament indicates it contemplated the application of the doctrine to the offence of retaining, and this view finds support in that Parliament has not since *Lum Man Bo supra* was decided in 1910, enacted any amendment to the section.

Per Rand, Kellock, Locke and Cartwright JJ. *contra.* The doctrine does not apply, the Crown must establish not only possession but knowledge subsequently acquired of the stolen character of the goods. *R.* v. *Cohen* 8 Cox C.C. 41 and *R.* v. *Sleep* 1 Le. & Ca. 44, applied. *The King* v. *Lum Man Bow supra, Richler* v. *The King* [1939] S.C.R. 101 and *Lopatinsky* v. *The King, supra,* distinguished.

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APPEAL by the accused from the judgment of the Court of Appeal for Ontario (1) affirming his conviction by Forsyth County Court Judge in the County Court Judges' Criminal Court for the County of York on a charge of retaining stolen goods in his possession. Reversed.

C. L. Dubin K.C. for the appellant. The doctrine of recent possession does not apply to a charge of retaining. The theory upon which the doctrine evolved was that a person who was in possession of goods recently stolen was likely to be the thief and he was called upon for an explanation as to the manner in which they came into his possession. It had been the law that the so-called presumptive inference from which a jury might convict related only to theft and not receiving. *R.* v. *Langmeand* (2) apparently for the first time extended that charge to receiving because receiving also contemplates a guilty knowledge at the time of receipt. Receiving recently stolen goods brings into question only the initial possession of the goods whereas on a charge of retaining the initial possession is presumed to be innocent and a person is guilty of retaining as distinguished from receiving when having come by the goods honestly he later acquires knowledge that they are stolen and keeps them. On such a charge an accused is not called on to explain his initial possession because it is presumed innocent and the entire doctrine of recent possession only calls upon the accused to explain his initial possession. *R.* v. *Searle* (3); *R.* v. *Jones* (4); *R.* v. *Carmichael* (5); *R.* v. *Powell* (6); *R.* v. *Lamoureux* (7); *R.* v. *Scott* (8); *R.* v. *Watson* (9).

The judgment in *R.* v. *Lum Man Bow* (10) to the contrary was wrongfully decided and it will be noted that the argument now submitted was not made in that case. The contrary view in *Richler* v. *The King* (11) is *obiter* and the Court was not dealing with the argument now submitted.

In the alternative, assuming that the doctrine of recent possession applies to a charge of retaining, the learned trial judge having acquitted the accused of receiving could not

(1) [1951] O.W.N. 104; 98 Can. C.C. 284.
(2) Le. & Ca. 427; 169 E.R. 1459; 9 Cox C.C. 464.
(3) 51 Can. C.C. 128; 24 A.L.R. 27.
(4) 47 Can. C.C. 380.
(5) 28 Can. C.C. 443 at 447.
(6) 3 Cr. App. R. 1.
(7) 4 Can. C.C. 101.
(8) 31 Can. C.C. 399.
(9) 79 Can. C.C. 77.
(10) 16 Can. C.C. 274; 15 B.C.R. 22.
(11) [1939] S.C.R. 101; 72 Can. C.C. 399.

properly in the circumstances have convicted him of retaining and the verdict is inconsistent. Assuming the doctrine did apply all that is thereby required was an explanation that might be reasonably true that the accused came by the goods honestly. Roach J.A. in the Court of Appeal held that the doctrine only required an explanation of how the accused came by the goods and that an explanation which rebuts the presumption on the receiving charge also rebuts it on the retaining charge and in the absence of other evidence establishing guilty knowledge at the time of receiving he is entitled to an acquittal. By an acquittal on the charge of receiving the accused has rebutted the presumption of guilty knowledge at the time he initially came into possession of the goods and any adverse inference from recent possession of stolen goods has been met. The Court of Appeal failed to give any effect whatever to the acquittal on the charge of receiving. Having been acquitted of receiving the accused is in the same position as if his explanation had been accepted and he could not properly be convicted unless there was evidence that after his initial possession of the goods he subsequently learned they were stolen. There is no such evidence. Neither the trial judge nor the Court of Appeal made any such finding and the conviction was made and affirmed solely on the doctrine of recent possession. The conviction on the charge of retaining was inconsistent with the acquittal on the receiving charge. *R.* v. *Cook* (1); *R.* v. *Mondt* (2); *R.* v. *Hayes and Pallante* (3); *R.* v. *Christ* (4).

The accused cannot be convicted of both the offences of receiving and retaining. The Court of Appeal held that the accused should have been convicted of receiving but having been acquitted on the receiving charge all the evidence could be considered on a retaining charge as if there had been no acquittal on the charge of receiving, and that the accused could be convicted of both offences, but the offences are alternative offences and an accused cannot be guilty of both. Where the accused has knowledge of the goods being stolen at the time of their reception, he is guilty of receiving and that offence is complete. If he continues to hold them he is still only guilty of receiving. It is only where he realizes some time after he initially received

(1) 15 Can. C.C. 40.
(2) 60 Can. C.C. 273.
(3) 77 Can. C.C. 195.
(4) 35 Cr. App. R. 76.

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them that the goods are stolen and then retains them that he is guilty of retaining. *R.* v. *Brown* (1); *R.* v. *Yeamen* (2); *R.* v. *McClennan* (3); *Ecrement* v. *The King* (4); *R.* v. *Ungaro* (5).

C. P. Hope K.C. for the respondent. "Receiving" and "retaining" in s. 399 relate to two different offences. *R.* v. *Searle* (6). This statement of the law applies here as the appellant was acquitted of "receiving" and convicted of "retaining". The appellant contends the doctrine of recent possession does not apply to a charge of retaining. It has long been held that it applies to the offence of receiving. *R.* v. *Langmead* (7). The Court of Appeal of British Columbia held that it applied to the offence of retaining. *R.* v. *Lum Man Bow* (8) and *R.* v. *Davis* (9). The latter case proceeded on the basis that the Crown must prove that the goods were in fact stolen. In *R.* v. *Parker* (10) McDonald J.A. at p. 12 says that in cases of receiving and retaining the question is not whether the explanation is believed but whether it is a reasonable one. O'Halloran J.A. in *R.* v. *Mandzuk* (11) at 290 "Lack of proof that the appellant knew the nature of the property and that it was stolen, fail to take into consideration that when a person is found in possession of recently stolen goods (in this case slightly under two months) that fact may be regarded as circumstantial evidence of his knowledge (and cf. *R.* v. *Wilson* (12) Martin J.A. at 67) that they were stolen, unless he gives a reasonable explanation of his possession of them." Bird J.A. at 295 "There being evidence of recent possession of stolen goods, a *prima facie* presumption arises that the accused is either the thief or the retainer of the stolen property . . ." In *R.* v. *Tuck* (13) the accused convicted of retaining appealed, one ground being misdirection as to recent possession. Roach J.A. who wrote the judgment of the Court says at p. 52 "The proper direction on the trial of an accused charged with receiving or retaining has been settled, if there was previously any doubt about it by the Supreme Court of Canada in *Richler* v. *The King* (14)."

(1) 65 Can. C.C. 244.
(2) 42 Can. C.C. 78.
(3) 80 Can. C.C. 370.
(4) 84 Can. C.C. 349.
(5) [1950] S.C.R. 430.
(6) 51 Can. C.C. 128.
(7) 9 Cox C.C. 464.
(8) 16 Can. C.C. 274.
(9) 75 Can. C.C. 224.
(10) 77 Can. C.C. 9.
(11) [1945] 3 W.W.R. 280.
(12) 35 B.C.R. 64.
(13) 86 Can. C.C. 49.
(14) [1939] S.C.R. 101.

At 103 the learned Chief Justice, with whom the other members of the Court agreed, said: "The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether the explanation might be reasonably true, or to put it in other words, whether the Crown had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty", and at p. 54 "It is true that the learned trial judge in those parts of his charge which I have quoted refers to the doctrine of recent possession in cases where the charge is receiving. But since the doctrine of recent possession applies similarly to a charge of retaining there was no misdirection . . ." In *R.* v. *Lopatinsky* (1) Estey J., who wrote the judgment of the Court, applies the doctrine to the offence of retaining.

As to the appellant's second point that the trial judge having acquitted on the receiving charge could not convict on the retaining charge. He was entitled to convict on both or either of them according to the way in which he viewed the evidence. *R.* v. *Langmead supra* per Pollock C.B. at 467, Martin B. at 468. In the instant case it was just as logical to convict of the retaining on an acquittal of receiving as it was in the *Langmead* case to acquit of theft and convict of receiving. It is for the jury to decide what is the proper verdict having regard to the facts. *R.* v. *Lincoln* (2). The reasoning of Roach J.A. who wrote the judgment of the Court of Appeal (3) is the correct reasoning, that of Martin J.A. in *R.* v. *Brown* (4) appears to be based on fallacious reasoning.

As to the appellant's third point that an accused person can not be convicted of both the offences of receiving and retaining, the point is irrelevant as the appellant was convicted only of retaining.

THE CHIEF JUSTICE: Leave to appeal was granted on the following questions of law:

(*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods;

(1) [1948] S.C.R. 220.
(2) [1944] 1 All E.R. 604.
(3) [1951] O.W.N. 104; 98 Can. C.C. 284.
(4) 65 Can. C.C. 244.

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(*b*) The learned trial judge having acquitted the accused on a charge of receiving could not in the circumstances of the case convict him on a charge of retaining;

(*c*) An accused person cannot be convicted of both offences of receiving and retaining.

In my humble view, the answer to Question (*b*) is sufficient to dispose of the appeal.

There is no doubt that the weapons were stolen goods; that the accused received them and that he had acquired recent possession of them. The only other element necessary to be proved in order to justify conviction on the charge of receiving was that the accused, at the time he received them, knew they were so stolen.

To establish that necessary element "the Crown relied on the doctrine of recent possession by the application of which the burden rested on the accused to give an explanation that he came by these weapons innocently", which explanation might reasonably be true, and, because it might reasonable be true, would raise a doubt as to his guilt.

Such explanation was given by the wife of the accused. The trial judge analyzed that explanation, examined every fact or element of same and came to the conclusion that it was not reasonable; but, when he came to apply that conclusion to the charge of receiving, he nevertheless acquitted the accused of that charge. On the same explanation, which he did not believe, he found the accused guilty of retaining.

As the only ground upon which he could acquit the accused of receiving was the explanation given by the wife, one must come to the conclusion that he believed it and found it reasonable with regard to the charge of receiving; while he stated in his judgment that he did not believe it with regard to the charge of retaining.

In my opinion that is incompatible. He could not at the same time believe the explanation or find it reasonable and disbelieve it and find it unreasonable.

All the facts considered by him with regard to that explanation, which led him to state that he thought the latter unreasonable, were all facts having to do with the charge of receiving. None were fresh facts which happened

subsequent to the receiving and relating only to the charge of retaining. That is precisely the interpretation of Roach J.A., who delivered the reasons for the Court of Appeal: (1). "The trial judge held that the explanation was not reasonable but he nevertheless acquitted him". There was only one explanation given and it applied to the charge of receiving. There was no distinct explanation given as regard to the charge of retaining.

There were no new facts put in evidence whereby a distinction could be made between the receiving and the retaining.

Very respectfully I think that the trial judge having acquitted the accused on the charge of receiving could not, in the circumstances of the case, convict him on a charge of retaining.

In my view, there is an absolute contradiction between the two findings of the trial judge.

For that reason, I am of opinion that the appeal should be allowed and the conviction set aside.

However, I understand that the reason for submitting *de novo* the appeal to the full Court was mainly to have the Court pronounce upon the question whether the doctrine of recent possession does or does not apply to a charge of retaining stolen goods; and on that additional point I wish to state that I concur with the other members of the Court who express the opinion that the doctrine does apply equally to a charge of retaining as to a charge of receiving stolen goods.

KERWIN J. (dissenting)—This is an appeal, by leave granted under section 1025 of the *Criminal Code* as enacted by s. 42 of c. 39 of the Statutes of 1948. The appellant was convicted in the County Court Judge's Criminal Court of the County of York, on June 7, 1950, of retaining in his possession, in the months of January and February, 1950, a Remington repeating shot gun and a Remington repeating rifle, the property of Grayson D. Burruss and therefore stolen, knowing the same to have been so stolen. This charge was the fourth count in a charge sheet which charged the appellant, first, with breaking and entering by day in

(1) [1951] O.W.N. 104;
98 Can. C.C. 284.

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January, 1950, the dwelling house of Grayson D. Burruss and stealing three guns and other articles, second, with breaking and entering by night in January, 1950, the same dwelling house with intent to commit theft, third, with receiving in his possession in the months of January and February the shot gun and rifle theretofore stolen, knowing the same to have been so stolen.

It was proved that on January 16, 1950, the gun and rifle were stolen from Mr. Burruss' house. The gun was found in the possession of the accused in his house on February 25, 1950. The rifle had on some earlier date in February been handed by the accused to one Enge for sale by the latter on terms that it would be sold for at least twenty dollars and that anything over that could be kept by Enge. There is no question about the identity of the gun and rifle and of the fact of their having been stolen. The accused did not give evidence but an explanation as to how these two articles came into his possession was given by his wife, which to some extent was corroborated by the testimony of Enge who had been called on behalf of the Crown. The County Court Judge found the explanation not reasonable and he found the appellant guilty on the fourth count, that is, of retaining, but endorsed the charge sheet with a verdict of not guilty on counts 1, 2 and 3.

Under these circumstances the first point argued was that the doctrine of recent possession does not apply to a charge of retaining. The applicable provision of the *Criminal Code* is s. 399, which reads as follows:

> 399. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.

The offence of retaining was unkown to the common or statute law of England but was introduced in Canada when the *Criminal Code* was first enacted in 1892. It is an entirely separate offence from receiving. The doctrine of recent possession, as to both theft and receiving, was clearly established in *Reg.* v. *Langmead* (1). There, Langmead had been indicted and tried for stealing sheep, and

(1) (1864) 9 Cox. C.C. 464.

on a second count, for receiving the sheep knowing them to have been stolen. The jury convicted him on the latter count. It was argued that upon an indictment for receiving stolen goods, there should be some evidence to show that the goods were in fact stolen by some other person, and that recent possession of the stolen property was not alone sufficient to support such an indictment as such possession was evidence of stealing and not of receiving. That argument was not accepted. Chief Baron Pollock pointed out that the distinction between the presumption as to felonious receiving and stealing is not a matter of law. Blackburn J. stated that as a proposition of law, there was no presumption that recent possession points more to stealing than receiving. He continued:

> If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property, the presumption is that he received it.

Of course, he was concerned only with the charges of stealing and receiving as there was no such offence as retaining known to the law at that time.

Logically there is as much reason to apply the doctrine to a charge of retaining as to a charge of receiving. It was so held by the Court of Appeal for British Columbia in *The King* v. *Lum Man Bow* (1), and by this Court in *Lopatinsky* v. *The King* (2). The point may not have been raised in those cases in the same manner as it was presented on this appeal but it was distinctly mentioned in the factum for the Crown, filed in this Court in the Lopatinsky appeal. I agree with the view of Roach J.A. in the Court of Appeal (3) in the present case where he states:

> Where the charge is retaining the explanation relates to the period of retention in this way and to this extent, that if at the time the accused received the goods he had knowledge that they were stolen, he continued

(1) (1910) 16 Can. C.C. 274.
(2) [1948] S.C.R. 220.
(3) [1951] O.W.N. 104; 98 Can. C.C. 284.

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thereafter to have that knowledge, but if at the time he received them he had not that guilty knowledge, there is no presumption that he thereafter acquired it. There is no burden on the accused who is charged with the offence of retaining to do more than give an explanation which might reasonably be true that at the time of receiving the goods he had not the guilty knowledge that they were stolen. Indeed, it is not difficult to think of a case in which a party innocently obtained possession of stolen goods and, apart from giving an explanation of the circumstances in which those goods came into his possession, he could do no more.

From the foregoing it follows that if an accused stands charged with both receiving and retaining stolen goods an explanation which rebuts the presumption on the receiving charge also rebuts it on the retaining charge and in the absence of other evidence establishing guilty knowledge at the time of receiving, he is entitled to an acquittal on that charge and in the absence of evidence establishing that after having received them he acquired knowledge that they were stolen, he is entitled to an acquittal on the retaining charge.

The second point raised by the appellant is that the trial judge having acquitted the accused of the charge of receiving could not, in the circumstances, convict him of retaining. However, it is not as if the trial judge had stated that he had accepted the explanation offered on behalf of the accused and therefore dismissed the charge of receiving, in which case it might be argued that there was nothing upon which he could base the conviction for retaining. In the circumstances existing in the present case, the fact that for some unexplained reason the appellant was found not guilty of receiving does not prevent a verdict of guilty of retaining. The rejection of the explanation permits the doctrine of recent possession to apply to the charge of retaining. It should be added that not only is there evidence upon which the trial judge could determine that the explanation was not reasonable but it appears that was the only proper conclusion.

The third point raised, that an accused person cannot be convicted of both offences, receiving and retaining, does not arise since the appellant was found not guilty of receiving.

The appeal should be dismissed.

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The judgment of Taschereau and Fauteux, JJ. was delivered by:

FAUTEUX J.:—It appears necessary, in view of the arguments raised in this appeal, to deal, at first, with the true legal notion of the offence or offences, created by the Canadian Parliament, in s. 399 of the *Criminal Code,* and then, consider the evidence on record and the conviction of retaining which is questioned by this appeal.

As to the first point.

By—and ever since—the enactment of the Criminal Code of Canada, retaining, as well as receiving, goods obtained by theft, knowing them to have been so obtained, constitutes a criminal offence in Canada. In this respect and since 1892, the Canadian law is at variance with the English law, wherein only the act of receiving, and not the act of retaining, constitutes an offence.

One of the consequences of this change and this difference in the two laws is that the cases decided in England,—where the occasion to discuss and apply a provision similarly worded as s. 399 never arose,—do not and cannot offer a precise and exhaustive definition of receiving and of retaining, both standing in relation to one another, as they do in s. 399.

But an important feature of the change, with respect to the real import of the section, stems from the very process by which it was accomplished. For this change in the law was not achieved by amendment, but by a codification of what became the main body of the Canadian Criminal Law, a law flowing from sources different in nature and origin. This very fact brings to the fore the rule of interpretation related to codification, according to which resort must not be had to the law pre-existing the codified law, unless the provisions of the latter be obscure and ambiguous.

Thus, to gather the true legal notion of the provisions of s. 399, the "proper course"—in the very words of Lord Halsbury, L.C., in *Bank of England* v. *Vagliano Brothers* (1), at page 151:

* * * is in the first instance to examine the language of the statute and to ask *what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law,* and not to start with inquiring

(1) [1891] A.C. 107.

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how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

But whether or not this rule is applied—and I can think of no reasons why it should not in the case under consideration—I fail to see what the difficulty is with respect to the first point, i.e., what facts may constitute an offence under the provisions of the section.

In the very terms of the provision under our law, everyone commits an indictable offence who:

(*a*) "RECEIVES or RETAINS in his possession * * *"

(*b*) "* * * anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada, would have constituted an offence punishable upon indictment * * *"

(*c*) "* * * KNOWING such thing to have been so obtained."

The natural meaning of this language is clear and non-ambiguous.

In (*a*):—If the evidence indicates the reception, on a charge of receiving, or the retention, on a charge of retaining, the first element, respective to each case, is fully established. This conclusion is equally true if, on either charge, both the reception and the retention are shown in the evidence; for—as far as the evidence is concerned—the question in each case, is not related to superabundance but only to sufficiency of the proof. Indeed, and in fact, less frequent may be the cases—but there are—where the one who receives does not retain, at least for some measurable time. The case of *Milton* v. *The King* (1) is a case in point. Equally, accidental may be the cases where a person who retains dishonestly, has received honestly, even though he had throughout the knowledge that the goods were stolen. This is illustrated by the case of *Rex* v. *Matthews* (2). Again and by the mere operation of s. 69 or others, one may in law, if not in fact, retain without having first received.

(1) (1943) 81 Can. C.C. 60. (2) [1950] 1 All E.R. 137.

The difficulty there may be in certain cases,—where, as an illustration, the reception and the retention amount to one single transaction—to determine when the reception ceases and when the retention begins, is one related to evidence and not to substantive law.

In my view, this element in (*a*), while being worded in all-embracing, but not obscure nor confusing terms, is clear evidence of the will of the Canadian Parliament to cover in the most complete and effective manner the case of possession, at both reception and retention time.

In (*b*):—No discussion arises in this case.

In (*c*):—The third element which, as the second, is common to receiving and retaining, is the guilty knowledge. The words in the enactment are "*knowing* such thing to have been so obtained". The guilty knowledge must then co-exist with possession,—and this statutory requirement is fully satisfied if it does—(1) at the time of reception, on a charge of receiving, or (2) at any time during the period of retention, on a charge of retaining. In this respect, receiving and retaining are distinguishable as criminal offences. And once an accused is proved to have received or retained anything, obtained in any of the manners indicated in (*b*), the question is:—Did he, (1) at the time of receiving or (2) at any time during the period of retaining, or (3) throughout the whole period of his possession, have the knowledge that the thing was so illegally obtained?

An affirmative answer to (1), or (2), or (3) undoubtedly establishes clear guilt and certainly makes the accused amenable to justice, for receiving in (1), for retaining in (2), or either of them in (3); for in each case, the elements of guilt, as enacted by Parliament, are present.

Indeed and in the third alternative, guilty knowledge co-exists with both the reception and the retention of the possession. The fact that the evidence on a charge of retaining would indicate that the guilty knowledge proven to exist during the retention, would have equally pre-existed to it, or the fact that the evidence on a charge of receiving would indicate that the guilty knowledge, proven to exist at the time of reception, would not have ceased to exist but continued thereafter, cannot alter but only strengthen, in each case, the proof of the co-existence of

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the guilty knowledge with possession. For the enactment merely says "*knowing* the same to have been so obtained". No matter then, *since when,* on a charge of retaining, or *how long after,* on a charge of receiving, does the guilty knowledge co-exist with possession, provided it does at any time during retention, on the former, or at the time of reception, on the latter. To import in the section any like questions as to the duration of the knowledge is, in my view, adding to the word "knowing"—the most essential word in the entire section—a qualification expressly rejected from the provision by the very word itself.

In brief, the section provides, as it was decided in several Canadian cases, for two distinct offences, the first being receiving and then the second being retaining anything illegally obtained, *knowing* it to have been so obtained.

With respect to punishment, the inescapable consequence of the distinction between the two offences is that the sentence stated in the section is the authorized punishment for the commission of either of the two offences therein created.

It is from the latter conclusion—which is not disputed—that stem the following argument and conclusion made on behalf of the appellant.

It is said that Parliament never intended that, in addition to a penalty for receiving, the accused should be liable to a further penalty if, after so acquiring stolen goods, he retains them. On the basis, and as a result of this assumption, another and a new concept of the offence of retaining is advanced and concluded to be the one meant by the language of the section. It is suggested that retaining stolen goods, knowing them to have been stolen, ceases to be the offence of retaining once the evidence, establishing a guilty knowledge during retention, also indicates that this guilty knowledge was gained at the time of reception of the stolen goods or, to put it with more precision, that the guilty knowledge in retaining must be—and, therefore, must be proved to be—not only subsequent to reception but exclusively so.

One would observe, at first, that this concept of retaining —in support of which no precedent has been found to exist —rests on the limited consideration of a case where receiving and retaining amount to a continuous or a single transaction.

It would nevertheless, if accepted, affect the infinite variety of cases where retaining or receiving may, in fact and in law, not amount to a continuous or single transaction. This, particularly in view of the clear language of the section, calls for the necessity of examining both the assumption and the conclusion advanced on behalf of the appellant.

As to the first.

Whether or not Parliament intended, in the particular case above stated, that an accused should be liable to two penalties, is a matter that we are not called upon to decide in this case. In all the reported cases where the occasion to decide the question could have arisen, one penalty only was given, or if two were stated, they were made concurrent. I fail nonetheless to appreciate how a negative answer to the question could afford a valid criterion for the interpretation of the section. For the fact that a man may not be *punished* twice for the same offence does not necessarily import that he may not twice be *prosecuted* on a different charge setting up another legal aspect of the same facts. S. 15 of the *Criminal Code* supports that proposition.

As to the conclusion of the new definition.

With deference, I am unable to agree with the view that while, admittedly, the offence of retaining must, as one of its elements, include the guilty knowledge at some time while the possession is being retained, it must also exclude it at the time when possession is gained. I can think of no case where Parliament states—except in express language—the elements of a crime in maximum or exclusive terms and where, as a consequence, evidence must be made to exclude certain facts in order to reach the degree of certainty required for a conviction in criminal matters. Receiving and retaining, in s. 399, are certainly not described in such a manner. Strange and most technical, I think, it would be (*a*) if a person accused of retaining, could, having admitted the existence of the guilty knowledge during the retention, plead successfully that this knowledge had been already gained by him at the very time the goods were received; or, conversely, (*b*) if a person, accused of receiving, could plead successfully on that charge, that the guilty knowledge existing, at the time he gained possession, continued thereafter with the retention of the possession.

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Under the authorities where possession is proved to be recent in relation to theft, a presumption arises that the possessor came by the goods dishonestly. If, consequently, the above definition of retaining is accepted, this presumption of fact could, by itself, defeat the case of the prosecution on a charge of retaining, where the evidence indicates recent possession.

That the evidence, in some cases, may, on either charge, indicate the elements of both crimes is certain, but, if it does, I can find no justification to say that one of either the charge of receiving or the charge of retaining should have been preferred, by preference to the other.

For these reasons, I am not only unable to conclude that the above contention, made on behalf of the appellant, casts any obscurity or ambiguity on the natural meaning of the provision, but I am convinced that, if accepted, it would directly defeat the only import of the word *knowing*.

Dealing now with the second point, i.e., the evidence on record with respect to the conviction of retaining in the present appeal.

In the present case, the evidence revealed particularly the following facts: On the 16th of January 1950, the residence of one Burruss was broken into and entered; certain chattels, including a Remington repeating shot-gun and a Remington repeating rifle were stolen therefrom; having gained possession of these weapons, the appellant gave the rifle—valued at sixty-eight dollars—to an immediate neighbour, one Enge, with instructions to sell it, at a price left at the latter's discretion, provided that out of the proceeds of the sale, twenty dollars would be remitted to the appellant; the other gun was still in the possession of the latter, on the 25th of February 1950, when it was seized in execution of a search warrant.

Thus the appellant—even on the theory of a defence—did, as a fact, receive and retain possession of stolen goods. Of this there is no dispute.

The only point in issue is related to the third element, i.e., the guilty knowledge of the appellant.

One cannot in fact—even if he may in law—retain possession of a thing without having first gained possession of the same. Thus, on a charge of retaining, in order to decide whether the retaining is honest or dishonest, it

becomes not only pertinent and material but essential to consider whether there is any admissible evidence in the case indicating that the accused had or had not the guilty knowledge when he gained possession.

For once the character of this original possession is, in a given case, ascertained by direct or circumstantial evidence, as being dishonest or not proved to be such, the character of this original possession cannot suddenly change without further evidence of some subsequent intervening fact altering it. Thus, and in the absence of any such subsequent fact, if the knowledge is shown by the evidence to be dishonest at the time when possession is gained, no presumption arises that it becomes honest during retention; and conversely, if the knowledge is proved to be honest—or not proved to be dishonest—at the time the accused gained possession, no presumption can either arise, without such subsequent fact, that this knowledge at the time possession was gained became dishonest during the period possession was retained.

Knowledge is a matter of fact and the proof of its character is not dependent on the nature of the charge laid but on the very nature of the facts disclosed in the evidence.

Amongst the methods of proving the guilty knowledge, the doctrine of recent possession must be considered. Thus, any person, found in possession of stolen goods, is presumed to have come by them dishonestly if such possession is recent in relation to the theft; or, as was said by the Lord Chief Justice in *Rex* v. *Powell* (1), at page 2:—

> The possession of recently stolen property throws on the possessor the onus of shewing that he got it honestly.

The presumption being applied in the case of an indictment with a count of theft and a count of receiving, the jurisprudence is that in the absence of any explanation which might reasonably be true, the accused may—but must not necessarily—be found guilty of either theft or receiving. But the presumption itself is one of fact and not one of law. Again, it is not dependent on the charge laid, but it rests solely on the fact that the possession of the stolen goods is recent in relation to the theft thereof. The guilty knowledge is then presumed.

(1) (1909) 3 Cr. App. R. 1.

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The fact that there are no authorities in England indicating that the presumption arising from recent possession would apply to what is a case of retaining under the Canadian law, is of no significance in the present discussion but is only consistent with the other fact that the offence of retaining as we have it under the *Code,* is not known in England.

That the complete doctrine of recent possession has been applied in Canada on a charge of retaining, is clearly evidenced by the following decisions: The Supreme Court of Canada in *Lopatinsky* (1); The Ontario Court of Appeal in *Rex* v. *Tuck* (2); The British Columbia Court of Appeal in *The King* v. *Lum Man Bow* (3). And in no reported cases, anywhere in Canada, was it said that the presumption is inapplicable on a charge of retaining.

In the present case, it is granted that the possession by the appellant of the stolen guns was recent in relation to the theft thereof. Thus, this sole fact, conditioning the play of the presumption, being established, the appellant is therefore presumed to have come by these guns dishonestly. This is a rule of evidence and not of substantive law.

Further, there is nothing in the evidence indicating that this original guilty knowledge was subsequently changed to become honest during the period of time covered by the count of retaining, in the charge sheet.

The accused was jointly tried on four counts, the third being for receiving and the fourth for retaining. At no time did he ask for a separate trial on each or any of these counts. And, in the evidence common to all counts and admissible in each, appears an explanation, not only as to how the appellant gained possession of the stolen guns but how he dealt with each of them thereafter. This explanation was not accepted by the trial judge, and was qualified as "preposterous" by all the members of the Court of Appeal. In the views of both Courts, the presumption that the accused came by these guns dishonestly had not been rebutted. It was open, therefore, to the trial judge to decide, as he did, that the guilty knowledge existing at the time the appellant gained possession of these guns continued while he retained them, for there was no evidence

(1) [1948] S.C.R. 220. (2) (1946) 86 Can. C.C. 49.
(3) (1910) 16 Can. C.C. 274.

of any subsequent fact affecting the dishonest character of the original possession. On the contrary, the facts subsequent to the time the accused gained possession of the guns, added to the presumption, resulting from the recent possession, that he came by them dishonestly, were only capable of strengthening this guilty knowledge during the time of retention. Thus, (*a*) the appellant sold one of the two guns which the alleged unknown hunters were supposed to claim back, (*b*) the sale was made at a ridiculous price left, besides, to the discretion of a neighbour to whom the gun was entrusted; (*c*) these alleged hunters unknown to the appellant were never heard of though two months had elapsed when the seizure of the last gun took place.

It is true that the learned trial judge acquitted the appellant on the charge of receiving—one is not bound to convict on the strength of the presumption alone, the rule is "may" but not "must" find guilt,—and found him guilty on the charge of retaining. This leads the appellant to argue that, there being no other evidence as to the guilty knowledge but the presumption arising from recent possession, the acquittal on receiving was evidence that the trial judge accepted the explanation of the defence as to recent possession.

No doubt that, having been acquitted of receiving, the appellant could, on a fresh indictment for the same offence, plead *autrefois acquit*. But to say that, on the basis of this acquittal on receiving, one must conclude that on the consideration of the charge of retaining, the trial judge accepted the explanation of the appellant when, in too concise oral reasons for judgment but yet in unmistakable terms, he effectively said he did not, does not follow. It may be that, had the verdict been given by a jury or had the trial judge given no reasons, the appellant could have invoked the decision rendered in the *Quinn* case (1), a decision resting on what is still a conflicting view of the law in Canada. See *Rex* v. *Bayn* (2); *L.* v. *The King* (3). But again, and in the present instance, the trial judge plainly said he did not accept the explanation. The presumption was not rebutted and it was open to the trial judge to decide as he did.

(1) (1905) 10 Can. C.C. 412; 11 O.L.R. 242.
(2) (1932) 59 Can. C.C. 89.
(3) (1934) 62 Can. C.C. 308.

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In support of the appellant's contention on this last point, the case of *Leonard Edward Ernest Christ* (1), was quoted. In my view, this case is not only distinguishable from the present one, but is rather conclusive against the theory advanced on behalf of the appellant. The *ratio decidendi* in that appeal is to be found behind the verdict. It rests on a consideration of the evidence made in the light of the summing up. It is expressed in these terms by Devlin J.: "It is impossible to believe that the jury could have accepted the evidence of the police, upon which alone they would be justified in convicting him of receiving, and that at the same time rejected it, or not accepted it, in the case of larceny." In that case, there was no alternative. The police could not, at the same time, be believed and disbelieved.

On the contrary, there is an alternative open to a judge or a jury when the presumption of guilt, arising from recent possession, is actually found to be unrebutted. Upon such unrebutted presumption, there may, or may not, be a verdict of guilty. Again, the doctrine is not that the judge "must" but that he "may" convict upon it. The essential point in the present appeal is that there is no place for speculation as to what the finding of fact of the trial judge was in this respect for he clearly stated he did not accept the explanation. This was a finding of fact and even if it may be stated that his conclusion or the verdict he rendered on the charge of receiving, did not follow from this finding of fact, this can hardly supply a valid reason to adopt, on the consideration of the charge of retaining, a conclusion which, again, would not follow from this particular finding of fact further supplemented with evidence of circumstances subsequent to the time of reception of the guns.

Furthermore, even on the basis of the proposition propounded on behalf of the appellant,—a proposition which, with deference, I do not accept—that in a case of retaining, the guilty knowledge must be exclusively subsequent to receiving, the oral judgment of the trial judge fully justifies the conclusion that on his view of the evidence, there was no doubt that the appellant had the guilty knowledge during the period of retention of the guns, even if he did not have it at the time he received them.

(1) (1951) 35 Cr. App. R. 76.

While each case must be determined according to its own factual and legal features, in the circumstances of the instant case I agree with the conclusion reached in the unanimous judgment of the Ontario Court of Appeal that the conviction on the count of retaining should stand.

The appeal, consequently, should be dismissed.

The judgment of Rand, Kellock, Locke and Cartwright, JJ. was delivered by:

KELLOCK J.:—The appellant was charged in the County Court Judge's Criminal Court with (*a*) breaking and entering by day the dwelling house of one Grayson D. Burruss and the theft therefrom of certain guns and other articles, (*b*) breaking and entering by night the said dwelling house with intent to commit theft therein, (*c*) receiving a shotgun and rifle, property of the said Burruss, knowing the same to have been stolen, and (*d*) retaining in his possession the said shotgun and rifle, knowing the same to have been stolen.

He was acquitted on the first three charges but was convicted on the charge of retaining, his appeal with respect to this charge being dismissed by the Court of Appeal for Ontario. The appellant now appeals to this court, by leave, upon the following questions of law:

(*a*) The doctrine of recent possession does not apply to a charge of retaining stolen goods.

(*b*) The learned trial judge, having acquitted the accused on a charge of receiving, could not, in the circumstances of the case, convict him on a charge of retaining.

(*c*) An accused person cannot be convicted on both the offences of receiving and retaining.

The charge of receiving of which he was acquitted was as follows:

That the said John Clay, at the Township of North York and elsewhere within the County of York, in the months of January and February in the year 1950, received in his possession a Remington repeating shotgun and a Remington repeating rifle, the property of Grayson D. Burruss, and therefore stolen, knowing the same to have been so stolen, contrary to the Criminal Code.

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The charge which is the subject matter of this appeal is

> And further, that the said John Clay, at the Township of North York and elsewhere within the County of York, in the months of January and February in the year 1950, retained in his possession a Remington repeating shotgun and a Remington repeating rifle, the property of Grayson D. Burruss, and theretofore stolen, knowing the same to have been stolen, contrary to the Criminal Code.

This last mentioned offence was for the first time made an offence in Canada under that name in 1892 when the *Criminal Code* was first enacted by 55-56 Vict. c. 29, s. 314 (now s. 399). The words, "or retains in his possession," were not in the bill as originally drafted, but were apparently added between second and third readings. The same words were also placed in s. 315 (now s. 400) and in the early part of s. 316 (now 401), but were omitted, perhaps by oversight, in the latter part of that section.

As to the offence of receiving stolen property with knowledge that it had been stolen, it was said by Avory J. in *Rex* v. *Norris* (1), that the offence of "receiving" is one of the most simple in the criminal law. "The essence of the charge is that the defendant should be proved to have known *at the time*" that the property had been stolen. The learned judge also said that, "Generally, it is enough to say that it is not a crime merely to be in possession of stolen property." So much is this so, even with knowledge of their stolen character, that in *R.* v. *Tennet* (2), the Court of Criminal Appeal quashed a conviction on the charge of receiving because the trial judge, in the course of his summing up to the jury, had said that the Crown had to prove that the accused knew the goods were stolen at the time he received them "or had them in his possession."

Knowledge, then, at the time the accused person comes into possession of the goods is the essence of the charge of receiving, and if the element of knowledge at that time be lacking, it will not do, in order to support a charge of receiving, to show that the goods were kept after guilty

(1) (1916) 12 Cr. App. R. 156 at 157. (2) [1939] 1 All E.R. 86.

knowledge subsequently acquired; *R.* v. *Johnson* (1). In fact, even though at the very time of receipt the accused person knows that the goods are stolen, but then intends to turn them over to the police, although he subsequently changes his mind, the offence of "receiving" is not made out; *R.* v. *Matthews* (2).

As s. 402 provides, the act of receiving is complete as soon as the offender has possession or control over the goods, or aids in concealing or disposing of them. Merely because, however, the goods may remain in the possession of the offender, does not render the offence any the less that of receiving, the essence of the offence being, as already pointed out, not length of possession but knowledge of the stolen character of the goods at the time possession is acquired. It is of interest to observe in this connection that the old form of indictment against a receiver, as set out in Taschereau's Criminal Acts (1888) p. 444, was

"that A.B., . . . did receive and *have* . . ."

When, therefore, Parliament added the words, "retains in his possession" anything obtained by any offence punishable on indictment "knowing such thing to have been so obtained," it could hardly have intended to have constituted a new and additional offence to be made out by mere continuance of possession for some "measurable interval of time" (to use the language of Roach J.A. in the court below) after receipt, as this ground was already covered by the offence of "receiving." Parliament must have intended to create an offence distinct from that of receiving, and as the latter includes all cases in which guilty knowledge was acquired at the time of the receipt of the goods, the offence of "retaining" can only arise where that element is lacking but where knowledge of their stolen character is subsequently acquired and the goods are kept thereafter. It has been so held in *R.* v. *Yeaman* (3), a decision of the

(1) (1911) 6 Cr. App. R. 218. (2) [1950] 1 All. E.R. 137.
(3) (1924) 42 Can. C.C. 78.

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British Columbia Court of Appeal; *R.* v. *Searle* (1), a decision of the Appellate Division of the Supreme Court of Alberta; *Frozocas* v. *The King* (2), and *Ecrement* v. *The King* (3), both decisions of the Court of King's Bench, Appeal Side, of the Province of Quebec. I think the offence of retaining is correctly described in *R.* v. *Searle* by Harvey C.J.A. at p. 128:

> Section 399 makes one "who receives or retains" guilty of an offence. One may receive stolen goods not knowing them to be stolen and subsequently learning that they were stolen may retain them and thereby become guilty of "retaining" though he could not be found guilty of "receiving".

These two different offences are very clearly described by Walsh J. in the *Frozocas* case at p. 331, as follows:

> It is true that an accused may be guilty of receiving goods stolen; he may also innocently receive the stolen goods, and become guilty of retaining them later, when he will have acquired knowledge of their unlawful source. Section 399, Cr. Code, was amended to cover the latter offence.

In the case with which the court was there concerned, it was contended that the conviction of the appellant was illegal because it condemned him for having committed two distinct offences; first, for having received the goods knowing them to have been stolen, and second, for having retained them with the same knowledge. Notwithstanding the form of the information and conviction, the evidence in the case was all directed to establishing guilty knowledge at the time of the actual receipt of the goods. With respect to the objection to the conviction, Walsh J. had this to say:

> Though s. 399 speaks of *receiving* and *retaining,* and though these may indicate at times separate offences, yet there are also times, and the present case is to the point, when retaining is a continuation of the act of receiving. In this instance, to have said that the accused retained the goods in question was only surplusage.

(1) (1929) 51 Can. C.C. 128. (2) (1933) 60 Can. C.C. 324.
(3) (1945) 84 Can. C.C. 349.

Howard J. put the point another way at p. 327, referring to the judgment of Harvey C.J.A. in *Searle's* case:

> I concur in the opinion expressed by the learned Chief Justice that s. 399 deals with two offences in a case such as he describes, but I have serious doubt that, where an accused has received goods which he knew at the time were stolen and retained them, an indictment to that effect can be said to contain two distinct counts. I am rather disposed to the opinion that in such circumstances, there is but one offence charged—that the acts of receiving and retaining constitute *"in substance one transaction, one continuous set of transactions:" Weinbaum* v. *The King* 53 Que. K.B. 270.

Letourneau J. at p. 329 dealt with the matter as follows:

> The appellant is right in alleging irregularity in the indictment for having received, concealed *and* kept stolen goods (*Rex* v. *Searle,* 51 Can. C.C. 128) in fine when s. 399 of the Cr. Code says, "who receives *or* retains in his possession . . ." but then again it must be said that if we come to the conclusion that a crime of having "received . . . knowing" etc., was committed, this plea in regard to a defect in the form of the complaint, is without any bearing.

Tellier C.J. and Dorion J. concurred.

It is plain, therefore, that the difference between these two offences is that, in the case of the offence of retaining, there is an interval of time, however short, between the actual receipt of the goods and receipt of knowledge of their stolen character, during which interval the possession is either an honest possession or the character of this interval is not in question. The answer to the third question of law raised on the appeal is, therefore, that an accused person cannot be convicted of both the offence of receiving and that of retaining the same goods. They are distinct offences and mutually exclusive. No one would suggest, I think, that the thief may be convicted of retaining merely because he keeps possession. I think a similar contention as to the receiver is equally unsound.

With respect to the presumption arising from possession of recently stolen goods, Pollock C.B., in his charge to the jury in *Regina* v. *Exall* (1), put the matter this way:

> Property recently stolen, found in the possession of a person, is always presumptive evidence against that person, unless the possession can be accounted for and explained consistently with innocence.

The question which arises is as to the offences with respect to the commission of which, such possession is evidence,

(1) 4 F. & F. 922.

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and that is answered by the learned Chief Baron in the passage immediately following that above quoted, namely,

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery.
>
> And so it is of any crime *to which the robbery was incident, or with which it was connected,* as burglary, arson or murder. For, if the possession be evidence that the person committed the robbery, *and the person who committed the robbery committed the other crime,* then it is evidence that the person in whose possession the property is found committed that other crime.

Examples of the application of the presumption in connection with the crimes mentioned are referred to in Taylor on Evidence, 12th Edition, p. 135, and Archbold, 32nd Edition, p. 404.

The offence of receiving is, of course, "incident to" or "connected with" robbery, burglary or theft, as may be also arson and murder, but that is not true of the offence of retaining stolen goods, as the latter is separated from knowledge of the character of the goods by reason of the interval of time already referred to. There is a complete break between the commission of these other offences and that of retaining, while in the case of receiving it is directly connected by reason of the guilty knowledge existing from the moment when the possession of the accused commences. In other words, recent possession implies association with the thief in the particular case. Any such connection in respect of a charge of retaining is, however, excluded by the elements of that offence.

The close connection between the offences of theft and receiving is indicated in East's Pleas of the Crown, Vol. 2, p. 744, in the author's discussion of earlier legislative attempts to deal with these offences, where he says that the receiver was generally the employer and patron of the thief. In fact, 29 Geo. II c. 30, s. 1, recites that "buyers or receivers are the principal cause of the commission of such theft." It may be that this fact entered into the reason for the rule under discussion.

In *Regina* v. *Langmead,* which is best reported in 1 Le. & Ca. 427, the defendant was indicted on two counts, one for theft and the other for receiving, knowing the goods to

have been stolen. Blackburn J. at 437 stated the presumption which arises from the fact of possession, as follows:

> I should have said that recent possession was evidence either of stealing or receiving, according to circumstances, and that, as soon as it was proved that the person in whose possession they were found did not steal them, his possession, if unaccounted for, was evidence that he had received them knowing them to be stolen.

While, as already stated, the offence of retaining stolen goods does not exist in England, the following from the same learned judge in the above case is pertinent with respect to the inapplicability of the presumption to an offence such as retaining. Blackburn J. said at p. 438:

> If you start with the *datum* that the prisoner was in possession of the sheep, then, his possession being dishonest, he must have been the receiver, if he was not the thief. As soon as it was shown that the prisoner could not have been the thief, it followed that he was the receiver.

This renders the point, in my opinion, very clear. In the case of theft and receiving, the possession of an accused *can only be a dishonest possession,* the only question to be answered so far as guilt is concerned being whether the accused actually stole the goods himself or received them from another person knowing them to be stolen. But if the character of the original receipt of the goods by the accused is not in question, but he is charged only with having subsequently acquired guilty knowledge, there is no room for the operation of the presumption with which the court in *Langmead's* case was concerned, and the Crown must establish affirmatively that such knowledge was in fact acquired. Just as the offence of retaining is itself the creation of statute, a statute would also be required to raise a presumption of guilty knowledge acquired after a receipt the character of which is not in question.

While, as already mentioned, there is no offence in England of retaining stolen goods generally, there has been for a great many years the offence of having possession of military or naval stores marked with His Majesty's mark. The statute 9-10 Wm. III c. 41 recites by s. 1 that it rarely happens that direct proof can be made that such goods have been stolen, but only that goods so marked were found in the possession of the accused. Section 2 goes on to provide that "such person or persons in whose custody, possession or keeping such goods or stores, marked as aforesaid" are found, should be liable to conviction.

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In *Regina* v. *Cohen* (1), the defendant was charged on indictment under s. 2 with unlawfully having in his possession certain naval stores marked with the broad arrow. It was held that it was necessary for the Crown to show, not only that the defendant was possessed of the articles, but also that he knew they were marked. Watson B. said at p. 42:

> I am of opinion that it is necessary, in order to convict a person under this statute of having naval stores marked with the broad arrow in his possession, to show not only that he had them in his possession, but that he also knew the nature of the articles, and that they were marked with the broad arrow. The statute is no doubt couched in very general terms; it does not state in so many words that he must have them in his possession "knowingly," but that must be the true meaning of the statute.

Hill J. said at p. 43 that

> no offence is committed under the second section unless it is shown that the individual in whose possession or custody the goods were knew that they were marked with the broad arrow.

A similar case under the same statute arose in *Regina* v. *Sleep* (2), in which the decision in *Cohen's* case was specifically approved. In *Sleep's* case, the Crown contended that upon the true construction of the statute a *prima facie* case was made out by showing that the stores were found in the prisoner's possession, and that the onus was then cast upon him of "showing that his possession is innocent." This contention was negatived, it being held that it was for the Crown to show that the defendant knew that the goods were marked goods. Notwithstanding that the statute said nothing about knowingly, the well settled principle of the criminal law that the defendant must have a guilty mind, rendered it necessary that the principle should be imported into the statute. The principle of this decision is embodied in s. 434 of the Code.

In a case such as the present, namely, retaining possession of goods recently stolen, the Crown must prove (*a*) that the goods were recently stolen, (*b*) that they were found in the possession of the accused, and (*c*) that after the accused acquired possession he learned of their stolen character. Just as, in a case arising under 9-10 Wm. III, there is no onus upon the accused to explain anything until the Crown has established not only possession of the marked goods but that the accused knew they were so marked,

(1) (1858) 8 Cox C.C. 41. (2) (1861) 1 Le. & Ca. 44.

equally in the case of an offence of retaining stolen goods, the Crown must establish not only possession in the accused but knowledge subsequently acquired of their stolen character. As Roach J.A. himself says in the court below, there is no presumption establishing such knowledge.

If it be said that the presumption here under discussion is applicable to a charge of retaining stolen property knowing it was stolen, and that the person accused of that offence must go into the witness box and explain how it was "come by," it seems to me that those who so say are also saying something else, namely, that in every charge of retaining there is included a count of receiving, with respect to which the accused must clear himself before the Crown will be called upon to do anything in the way of establishing that after the receipt of the goods the accused learned of their stolen character. From this it follows that if the explanation of the accused as to how he "came by" the goods is not accepted, he will be convicted, and, as the charge is that of retaining, the conviction will also be called retaining, although in reality, it will be for receiving. Such a procedure merely confuses the two charges which by definition are separate and distinct. If this view were permissible, it is difficult to see why the Crown would lay a charge of receiving in any case.

As the Quebec Court of Appeal pointed out in the case of Frozocas, a charge of receiving has nothing added to it by words alleging that the accused retained the goods. On the other hand, if a charge of retaining were drawn expressly so as to include a charge of receiving, it would be bad for multiplicity. I come back to the point that on a charge of retaining as distinct from receiving, the state of mind of an accused person when he received possession of the goods is not in issue. In *Rex* v. *Bond* (1), Kennedy J. said at p. 397:

> It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue: Roscoe's Digest of the Law of Evidence in Criminal Cases, 12th Ed. (1898) pp. 78, 79. When a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected

(1) [1906] 2 K.B. 389.

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with such charge; therefore, it is not allowable to shew on the trial of an indictment that the prisoner has a generel disposition to commit the same kind of offence as that for which he stands indicted.

It is said that the decision of the Court of Appeal for British Columbia in *The King* v. *Lum Man Bow* (1), was decided in a contrary sense. It is true that the charge in that case was that the accused did "unlawfully retain stolen property in their possession" knowing the same to have been stolen, but when the report is examined, it is plain that the case was treated as one of receiving and that the distinction between the two offences was not in the mind of any of the members of the court. The goods there in question which were stolen on the night of December 3-4, were found, on the afternoon of the 4th, in the possession of the accused who failed, in the language of the stated case, "to give a satisfactory account of how they *came by* the property."

Macdonald C.J.A., with whom Galliher J. concurred, referred, in the course of his judgment, to the argument on behalf of the accused that the only presumption which arose on the facts stated was a presumption that the accused had stolen the property, which excluded the presumption that they had retained it knowing it to be stolen. The learned Chief Justice negatived the contention, stating that in his opinion, the question was fully covered by the decision in *Langmead's* case where, he said, "precisely the same question arose and where the judges were unanimously of the opinion that whenever circumstances are such as to render it likely that the accused did not steal the property, the presumption is that he *received* it." The learned Chief Justice went on to say that in the case he was discussing, the charge was for retaining, not receiving, and that he thought the principle, so far as the presumption was concerned, was the same. He said that he adopted the contention of the Crown that the extension of the Code to the offence of retaining "was, I think, intended, as Mr. Maclean argued, to remedy a defect in the law which failed to reach persons who were indicted for the offence of receiving, but who afterwards were proven to be the thieves. The same person could not be the thief and the receiver, but under the present section he may be convicted notwithstanding that it should turn out on the trial that he *had actually*

(1) 16 Can. C.C. 274.

stolen the goods." It is quite evident from this what the idea of the offence of retaining was in the mind of the learned Chief Justice, and that it was not the offence which, in my view was created by the provisions of s. 399. The learned Chief Justice was making two offences out of theft merely from the fact that the person taking the goods did not immediately pass them on. This is the same contention applied to "receiving" with which I have already dealt.

It is also quite plain from the judgments of both Irving and Martin JJ.A. that they treated the case with which they were dealing as one of receiving. The latter expressly says that he had no doubt that the conviction of the accused "as receivers" was justified.

This case cannot, therefore, be said to be authority for the proposition contended for by the Crown in the case at bar.

On behalf of the Crown, we were referred to the decision of this Court in *Richler* v. *The King* (1). A reference to that case shows that the conviction there was for "receiving or retaining," and there is no discussion in the judgment of retaining as a separate offence. The point here in question was not raised. The Crown also referred us to *Lopatinsky* v. *The King* (2), where the conviction was for retaining. Again, however, the distinction between the two offences was not raised, and the evidence in the case was directed entirely to establishing guilty knowledge at the time the goods were received. While the charge there under discussion was one of retaining, the offence actually proved was receiving, and no point was made in the case of any distinction between the two offences. The same is to be said of *Rex* v. *Pomeroy* (3). The appeal to this court was dismissed, but is unreported. I think, therefore, that this court is not hampered by anything said in any of the decisions cited, and that the answer to the first question of law with respect to which leave to appeal was granted should be that the doctrine does not apply. This brings me to the second question.

In *Regina* v. *Sleep, ubi cit.*, appeal was from a conviction under 9-10 Wm. III c. 41, s. 2, for having been found in possession of naval stores marked with the broad arrow. The jury, in answer to questions, found (*a*) that the goods

(1) [1939] S.C.R. 101.
(2) [1948] S.C.R. 220.
(3) [1936] 4 D.L.R. 523.

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were so marked, (*b*) that the prisoner had reasonable means of knowing they were so marked, but (*c*) that there was not sufficient evidence he did know. The conviction was set aside, notwithstanding that in the opinion of the court on appeal, there was abundant evidence of guilty knowledge, and that the jury ought to have so found.

In the case at bar, the appellant has been acquitted on the charge of receiving. In my opinion, he ought to have been convicted on that charge, but there is no appeal as to it, and that being so, there is no longer any question as to the state of mind of the appellant when he obtained possession of the guns here in question. It was for the Crown, therefore, to establish that subsequently, guilty knowledge as to the character of the goods was acquired by the appellant. In my opinion, the respondent failed to do so. It was contended that the fact that the name of the owner was on the case in which one of the guns was contained, was sufficient. Even if this could be said to be sufficient evidence, which I doubt, it is not to be assumed that this fact came to the attention of the accused at all, or did not come to his attention at the time he obtained possession originally. While the learned trial judge was entitled to give consideration to all the evidence when dealing with the charge of retaining, there was, in my opinion, no evidence or no sufficient evidence upon which a conviction on that charge could be supported. I would therefore allow the appeal and set aside the conviction.

ESTEY J.:—The appellant was tried before a judge, sitting without a jury, upon an indictment containing four counts: first, breaking and entering by day and stealing; second, breaking and entering by night with intent to steal; third, that he did receive a shot gun and a rifle, knowing they were stolen; and fourth, that he did retain in his possession the shot gun and rifle, knowing the same to have been stolen. He was found not guilty under counts one, two and three, but guilty under count four of retaining the shot gun and rifle. This conviction was affirmed by the Appellate Court of Ontario.

The evidence established the theft of the shot gun and rifle and that they were found in the recent possession of the appellant. The appellant did not give evidence, but his wife was called as a witness on his behalf and gave an

explanation as to how the shot gun and rifle had come into the possession of her husband. At the conclusion of the trial the learned trial judge stated, in part:

> I do not think that the explanation offered by the defence, in this matter, is a reasonable explanation and am therefore finding the accused guilty on the evidence, guilty of retaining, and that is guilty on count four.

Counsel for the accused contends that the presumption arising out of recent possession does not apply to a charge of retaining. S. 399 of the *Criminal Code,* under which counts three and four were laid, reads as follows:

> Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained.

The offence of retaining was not known to the common law, nor is it included in any of the British statutory offences. In Canada it was first made an offence by the insertion of the words "or retains" in the section of our Code of 1892 (S. of C. 1892, c. 29, s. 214). The language "receives or retains" in s. 214 (now 399) would indicate an intention on the part of Parliament to treat these offences as separate and distinct. Such an intention is emphasized by the provision in s. 402 in which it is provided that the act of receiving is completed as soon as the person has possession or control over the property. This section has been so construed in Canada. *Rex* v. *Yeaman* (1); *Rex* v. *Searle* (2); *Frozocas* v. *The King* (3); *Ecrement* v. *The King* (4).

The issue here raised was decided adversely to the contention of counsel for the appellant by the Court of Appeal of British Columbia in *The King* v. *Lum Man Bow* (5). The Court of Appeal of Ontario, in affirming the conviction of the appellant, expressly concurred in the view expressed in *The King* v. *Lum Man Bow.* The British Columbia Court of Appeal based its conclusions largely upon the decision in *Reg.* v. *Langmead* (6). In the *Langmead* case the accused was charged with both stealing and

(1) [1924] 2 W.W.R. 452; 42 Can. C.C. 78.

(2) [1929] 1 W.W.R. 491; 51 Can. C.C. 128.

(3) (1933) 60 Can. C.C. 324.

(4) (1945) 84 Can. C.C. 349.

(5) 16 Can. C.C. 274.

(6) (1864) 1 Le. & Ca. 427; 169 E.R. 1459; 9 Cox C.C. 464.

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receiving and his counsel submitted that, as the evidence proved no more than recent possession by the prisoner, the jury should have been directed that they could not lawfully find the prisoner guilty of receiving. This contention was rejected. Pollock, C.B. stated:

* * * the distinction taken by Mr. *Carter* between a charge of stealing and one of receiving, with reference to the effect of evidence of recent possession, is not the law of *England*. If no other person is involved in the transaction forming the subject of the inquiry, and the whole of the case against the prisoner is that he was found in the possession of the stolen property, the evidence would, no doubt, point to a case of stealing rather than a case of receiving; but in every case, except, indeed, where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property stole it himself or received it from some one else. If, as I have said, there is no other evidence, the jury will probably consider with reason that the prisoner stole the property; but, if there is other evidence which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them to be the more probable solution.

Blackburn, J. stated:

I do not agree with Mr. *Carter* in thinking that recent possession is not as vehement evidence of receiving as of stealing. When it has been shewn that property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.

In Great Britain where, as already stated, there is no offence of retaining, the courts have held that recent possession of stolen property raises a *prima facie* case or a presumption to the effect that the accused knew the goods were stolen when he received them. The further question of whether recent possession should raise a presumption to the same effect when the offence charged is retaining has, in Great Britain, never been considered. It would appear, therefore, that in Canada, where the offence of retaining is contained in the *Criminal Code*, the answer to the question must be found in an examination of the nature and character of the presumption as well as the offence of retaining, and the purpose and object Parliament had in enacting the same, with a view to ascertaining whether the presumption should be applied to the offence of retaining as well as to that of receiving, just as in *Reg.* v. *Langmead* it was held that the presumption applied to receiving as well as to theft.

In *Reg.* v. *Exall* (1), the charge was burglary. Pollock, C.B. stated to the jury:

> The principle is this, that if a person is found in possession of property recently stolen, and of *which he can give no reasonable account,* a jury are justified in coming to the conclusion that he committed the robbery. And so it is of any crime to which the robbery was incident, or with which it was connected, as burglary, arson or murder. For, if the possession be evidence that the person committed the robbery, and the person who committed the robbery committed the other crime, then it is evidence that the person in whose possession the property is found committed that other crime.
>
> The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to *account* for the possession, that is, to give an explanation of it, which is not unreasonable or improbable.

Wills on Circumstantial Evidence, 7th Ed., pp. 93 and 94:

> Since the desire of dishonest gain is the impelling motive to theft and robbery, it naturally follows that the possession of the fruits of crime recently after it has been committed, affords a strong and reasonable ground for the presumption that the party in whose possession they are found was the real offender unless he can account for such possession in some way consistent with his innocence * * * The force of this presumption has been recognized from the earliest times; and it is founded on the obvious consideration, that if such possession had been lawfully acquired, the party would be able, at least shortly after its acquisition, to give an account of the manner in which it was obtained; and his unwillingness or inability to afford such explanation is justly regarded as amounting to strong self-condemnatory evidence.

Roscoe's Criminal Evidence, 15th Ed., p. 22:

> It has already been stated that possession is presumptive evidence of property; but where it is proved, or may be reasonably presumed, from the proved circumstances, that the property in question is stolen, the *onus probandi* is shifted, and the possessor, to rebut an accusation, is bound to explain reasonably that he came by it honestly; and if he fail to do so, the presumption is that he is the thief *or* the receiver, according to the circumstances.

The foregoing quotations indicate that the presumption of recent possession has no statutory origin, but has developed in the common law on the basis that reason and experience may justify a conclusion of guilt where the recent possession of stolen property remains unexplained. The nature and purpose of such a presumption is emphasized by Thayer, Preliminary Treatise on Evidence, p. 314:

> Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience.

(1) (1866) 4 F. & F. 922; 176 E.R. 850.

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This presumption of recent possession is applied where a party has been found in possession of stolen property so recently in relation to the time of the theft thereof that reason and experience lead to the conclusion that he may either be a party to the theft or has possession of the property with knowledge of its theft. It is of the utmost importance to keep in mind that the Crown must first prove that the property has been stolen and then that it was found in possession of the accused. It is not, however, the mere possession, but rather the recent possession in relation to the time of the theft, that raises the presumption and which presumption is rebutted by a reasonable explanation of honest possession. If the possession of stolen property is not found to be recent, the presumption does not arise, no matter what the offence charged may be.

This presumption of fact has not been restricted in its application to theft and receiving. In *Regina* v. *Exall* (1), it was extended to burglary and, as Pollock, C.B. stated, it applies to "any crime to which the robbery was incident, or with which it was connected, as burglary, arson or murder." In Taylor on Evidence it is pointed out that "The presumption . . . applies to all crimes, even the most penal," and reference is there made to cases of arson, burglary and murder. Taylor on Evidence, 12th Ed., 135, para. 142. See also Archibald's Cr. Pl. Evid. & Pr., 32nd Ed., 404.

It would appear, having regard to the language of Pollock, C.B. in the *Exall* case *supra,* that the offence of retaining, in relation to this presumption, is as "incident" to, or as immediately "connected" with the theft as receiving. The issues at a trial of theft and receiving are quite different. *The Queen* v. *Lamoureux* (2); *R.* v. *Lincoln* (3). A thief cannot receive from himself. *R.* v. *Langmead supra; R.* v. *Exall supra. R.* v. *Carmichael,* (4); *R.* v. *Brown* (5). The offence of receiving contemplates a person receiving the property after the theft has been completed. Retaining is in exactly the same position except that the retention contemplates an innocent receiving, then subsequently, in any appreciable time, however short, the

(1) (1866) 4 F. & F. 922; 176 E.R. 850.
(2) (1900) 4 Can. C.C. 101.
(3) [1944] 1 All E.R. 604.
(4) (1915) 26 Can. C.C. 443; 22 B.C.R. 375.
(5) (1936) 65 Can. C.C. 244.

acquisition of knowledge that the property was stolen, and thereafter a retention of same. When the importance of recent possession in relation to the time of the theft is kept in mind, retaining is as "incident" to, or as "connected" with the theft as receiving.

It has been emphasized that at common law it was only the initial possession to which the presumption was applied, not, however, because of the nature and character of the presumption, but because in the offence of receiving it was only the knowledge at the moment of the initial receipt that was in issue. Upon a charge of receiving an accused might have any amount of subsequent knowledge that the goods were stolen, but, if he received them innocently, at common law he was not guilty of that or of any other offence. This was because of the definition of the offence of receiving and not the nature and character of the presumption, under which an accused found in recent possession of stolen property might be found guilty in the absence of any reasonable explanation on his part. In other words, the presumption was raised against an accused charged with receiving, whether he received the property with knowledge that it had been stolen, or whether he acquired that knowledge subsequently to receiving it and then continued to retain the goods, or, indeed, whether he received and at all times held the property innocently. He could at common law, however, be found guilty only if he acquired the possession with guilty knowledge.

The offence under s. 399, without the words "or retaining," is the common law offence of receiving stolen property. One who was charged with receiving at common law and whose evidence was accepted that he had received the stolen goods innocently, but that subsequently, in no matter how short a time, he acquired knowledge that the property was stolen and still retained it, was not guilty of receiving. *Re Richard Johnson* (1); *Rex* v. *Tennet* (2); *Rex* v. *Matthews* (3). The Parliament of Canada concluded that one who retained stolen property, knowing it to have been stolen, committed an offence against society as great as that of the receiver and in 1892, while the bill was passing through Parliament, inserted the words "or retaining" after the word "receiving" in s. 214 (now 399)

(1) (1911) 6 Cr. App. R. 218. (2) [1939])1 All E.R. 86.
(3) [1950] 1 All. E.R. 137.

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and placed that offence on the same basis and provided the same punishment therefor as that of one who received the goods knowing they were stolen. It would seem that Parliament, by such an enactment, would intend that the same rules of evidence and presumption should apply to both offences.

As already stated, the British Columbia Court of Appeal, in 1910, decided that the presumption of recent possession applied where the indictment charged that the accused retained stolen property knowing the property was stolen. The *King* v. *Lum Man Bow supra.* While apparently the question has never been raised in a subsequent case with the clarity here presented by Mr. Dubin, it appears that in all of the reported cases subsequent thereto it has been more or less assumed that the presumption did apply to both receiving and retaining. *Rex* v. *Mandzuk* (1); *Rex* v. *Davis* (2); *Rex* v. *Parker* (3); *Rex* v. *Sullivan and Godbolt* (4); *Rex* v. *Tuck* (5); *Rex* v. *Richler* (6); *Rex* v. *Lopatinsky* (7). It would appear that if Parliament had not intended that this well known presumption, so long established in our law, should apply to retaining as well as to receiving that it would, at some date since 1910, have amended the section by the addition of apt words to that effect.

Receiving and retaining, as already stated, just as theft and receiving, are separate and distinct offences and an accused, even when the evidence of guilty knowledge is found only in the presumption, can only be found guilty of either theft or receiving, but not both. Upon the same basis an accused cannot be found guilty of receiving and retaining. The *Criminal Code* contemplates that upon the same facts an accused shall be convicted and suffer but one punishment. If an accused party receives the guilty knowledge coincident with possession of the stolen property, he is guilty of the offence of receiving and not of retaining. If, however, he receives the property and subsequently acquires knowledge that the property was stolen, and thereafter continues to retain same, he is guilty of the offence of retaining. The presumption of recent possession

(1) [1945] 3 W.W.R. 280.
(2) [1940] 75 Can. C.C. 224.
(3) (1941) 77 Can. C.C. 9.
(4) (1946) 85 Can. C.C. 349.
(5) (1946) 86 Can. C.C. 49.
(6) [1939] S.C.R. 101.
(7) [1948] S.C.R. 220.

applies to all three of these offences and if counts covering each one are included in the indictment it is for the jury, at the conclusion of the hearing, to find the accused guilty of one or other, or not guilty of all of these offences. Pollock, C.B., in *Reg.* v. *Langmead supra,* expresses this view as to theft and receiving, and, following his analogy, if the evidence of guilty knowledge adduced by the prosecution is restricted to that arising out of the presumption of recent possession and no further evidence is adduced, a jury would probably conclude that the accused was guilty of receiving. If, however, there is other evidence, it will be for the jury to say whether the accused be guilty of either receiving or retaining, or not guilty of either.

While the offences of receiving and retaining are separate and distinct, the essential difference is the time of the acquisition of knowledge on the part of the accused. In all other essentials there is no great difference. The existence of the motive for dishonest gain referred to in Wills on Circumstantial Evidence *supra* as a basis for the presumption is of no greater significance in relation to receiving than to retaining.

It would appear, therefore, that the submission that the presumption applies to retaining as well as to receiving is justified in principle. The language adopted by Parliament would seem to have contemplated its application to the offence of retaining, and this view finds support in that Parliament has not, since *Lum Man Bow supra* was decided in 1910, enacted any amendment in respect of this section.

The explanation here given related to the initial reception of the stolen property and was disbelieved by the learned trial judge. With great respect, upon that finding the accused should have been found guilty of receiving. There was no evidence that justified the conclusion that he received the goods without knowledge of their having been stolen and subsequently acquired such knowledge and thereafter continued to retain same. Learned counsel for the Crown suggests that, because the accused sold the rifle for $20, when the evidence disclosed that its replacement cost would be $68, therefore there was an inference of subsequent knowledge, but this he may well have done because he knew it was stolen when he received it. Certainly there is no fact here established to suggest he received it at any other time.

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He next drew attention to the fact that the purchaser of the rifle found the owner's name thereon, which aroused his suspicion and caused him to communicate with the police. The evidence establishes that the name was not at all conspicuous and was only found by the purchaser when he was cleaning the rifle, nor is it suggested throughout the evidence that the accused knew of the presence of that name. Counsel then referred to the fact that the hunters never came back. The difficulty with regard to the hunters is that the only evidence of their existence forms a part of the explanation which the learned trial judge did not believe.

In my opinion, with great respect, the evidence here adduced on the part of the Crown justified a conviction for receiving, upon which the learned trial judge acquitted and from which no appeal has been taken and which is, therefore, not before this Court. The evidence does not support a conviction of retaining, as that offence is constituted under s. 399.

The appeal should be allowed and the conviction quashed.

Appeal allowed and conviction set aside.

Solicitors for the appellant: *Kimber & Dubin.*

Solicitor for the respondent: *C. P. Hope.*

LEWIS L. STRAUSS *(Plaintiff)* .....APPELLANT;

AND

JOHN BOWSER *(Defendant)* .....DEFENDANT.

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*June 4
*Oct. 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Sale of Goods—Warranty on sale of bull for breeding purposes—Whether related to time of sale or to future.

The respondent in November 1948 sold a bull to the appellant under the following written warranty: "This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you." The appellant took delivery in Ontario and transported the animal by truck to Virginia, some 800 miles. In April 1949 the appellant for the first time employed the bull for breeding purposes and found it to be suffering from a deformity rendering such use impossible. In an action by the purchaser against the vendor for damages for breach of warranty

Held: (Affirming the judgment of the Court of Appeal for Ontario), that the appeal should be dismissed.

Per Kerwin and Estey JJ.—While a warranty may expressly relate to the future, unless it is so expressly stated, the warranty relates to facts as they were at the time of the sale. *Liddard* v. *Kain*, 2 Bing. 183, 130 E.R.; *McGill* v. *Harris*, 36 N.S.R. 414; *Eden* v. *Parkison* 2 Doug. K.B. 732, 99 E.R. 468; *Chapman* v. *Gwyther* L.R. 1 Q.B. 463. *Kyle* v. *Sim* [1925] S.C. 425, distinguished. To divide the warranty into the past, present and future, as the appellant sought to do, was not the correct way in which to read it. The words "I guarantee him to be a breeder for you" were not to be viewed as anything more than a warranty that at the date of the sale there was nothing to prevent the bull being a breeder for the appellant. The rejection by the trial judge of the opinion evidence of appellant's witnesses in favour of the factual evidence and that of respondent's expert witness, was fully justified. On the proper construction of the warranty, even if the onus were upon the respondent of establishing that any injury was not suffered prior to the sale, and that there was no congenital defect, that onus was met.

Per Kellock J. The appellant's contention that the guarantee would have been effective as to the defect in question, if congenital, although becoming patent after the date of the sale, was well founded but appellant failed on the evidence to exclude the possibility of the condition having been brought about by injury subsequent to the sale.

Per Cartwright and Fauteux JJ. It was not necessary to decide whether on its true construction the warranty related to the future or whether, if it did, it extended so far into the future as April 1949. The breach of warranty which the appellant pleaded and on which he based his case at the trial was not merely that the bull was not a breeder in April 1949, but that the congenital deformity from which it was then suffering made it impossible that it could have ever have served a cow or been a breeder. The respondent met

*PRESENT: Kerwin, Kellock, Estey, Cartwright and Fauteux JJ.

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this case by evidence that the bull had served a number of cows in a normal manner and that it had sired a number of calves. There was thus ample evidence to support the finding of the trial judge that the bull conformed to the warranty when delivery was made.

APPEAL by special leave of the Court of Appeal for Ontario from the judgment of that Court (1) (Henderson and Bowlby JJ.A., Hogg J.A. dissenting) dismissing an appeal by the appellant from the judgment of Barlow J. (1).

J. D. Arnup K.C. and *A. H. Young K.C.* for the appellants—The trial judge erred in his interpretation of the warranty and did not consider whether it extended into the future. While a warranty ordinarily applies to conditions existing at the time of the sale, it may also, either by express terms or by implication from the facts, apply to a future time. *Benjamin on Sale* 7th Ed. (1931) 698; *Kyle* v. *Sim* (2); *Natrass* v. *Nightingale* (3); *Wood* v. *Anderson* (4); *Liddard* v. *Kain* (5). Since the respondent knew the purpose for which the bull was being purchased, the warranty he gave was intended to guarantee the animal's capacity as a breeder in the future. The words "I guarantee him to be a breeder for you" are not a warranty of a present condition (which was adequately covered by the words "This bull is right and sound in every way to the best of my knowledge"); they are intended to be a warranty of future performance and to relate to a future time.

The learned trial judge did not direct his mind to these implications of the warranty but was content merely to find that the bull conformed to it at the time of the sale. The appellant, having proved the warranty given, and the inability of the bull to serve cows as warranted, established a *prima facie* case and the onus then shifted to the respondent to show the bull's incapacity was due to a subsequent accident or some other supervening cause. No evidence was put in by the respondent to satisfy this onus and the trial judge's statement that "The bull may very well have suffered an injury resulting in the deformity found by the plaintiff on the long trip to Virginia", is mere conjecture. The majority in the Court of Appeal made

(1) [1951] O.R. 31.
(2) (1925) S.C. 425.
(3) (1858) 7 U.C.C.P. 266.
(4) (1915) 33 O.L.R. 143.
(5) (1824) 2 Bing. 183.

the same error in law in finding that "the case made for the plaintiff before the learned trial judge was met by the case of the defendant". The trial judge erred in finding that the bull conformed to the warranty at the time of the delivery and that the deformity might have been caused by injury.

The appellant's witnesses gave expert testimony that the deformity was not and could not have been caused by injury but that it was congenital, rendering the bull incapable of ever serving a female animal. The trial judge was unwilling to accept these statements and the only reason he gave was that they were only opinions, based on premises he did not find impressive. In preference he accepted the evidence of the defendant, his employees and neighbours as to the bull's breeding capacity, only one of whom could testify that he had ever known of a calf sired by the bull. The proper conclusion was that the bull was incapable of breeding and did not conform to the warranty even at the date of delivery. The evidence of the two veterinaries, the appellant's expert witnesses, was based on actual examination and was not shaken in cross-examination. The veterinary who gave evidence for the respondent did not see the bull but gave evidence based on certain pictures filed as exhibits and on a summary of the evidence of the two veterinaries who testified for the appellant.

A. A. Macdonald K.C. for the respondent.—The appellant's contention that the condition of the animal here in question was congenital signally failed on the evidence. The language used in the warranty is of a kind that a person such as the respondent would normally and naturally use to express a guarantee as to the then existing condition of the animal and such warranty properly interpreted is limited to such a guarantee and is not operative *in futuro*. The language should be so unequivocal in order to express a guarantee *in futuro* that the document should not be capable of any other meaning. *Chapman* v. *Gwyther* (1). The normal meaning and effect to be attached to a guarantee, subject to its expressly stipulating otherwise, is that it is limited to the condition of the animal at the time of the sale and delivery. Halsbury's Laws of England 2nd Ed. Vol. 1, 561; *Chapman* v. *Gwyther*

(1) (1866) L.R. 1 Q.B. 463 at 466-7.

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(*supra*); *Eden* v. *Parkison* (1); *McGill* v. *Harris* (2); *Cameron* v. *McIntyre* (3). On the facts and circumstances shown, it is not reasonable or equitable that the respondent should be taken to have guaranteed or intended to guarantee that the animal would be a good breeder five months after the sale and delivery despite anything that could or might happen to it, either in transit or afterwards. The onus was on the appellant to establish that any injury suffered by the bull occurred prior to the sale and delivery to the appellant, and no evidence of any such injury was adduced. *Long* v. *Byers* (4); *Westwood* v. *McMillan* (5). The order appealed from is right, and the judgment of the trial judge for the reasons given by him, and this appeal should be dismissed with costs.

J. D. Arnup K.C. in reply.

The judgment of Kerwin and Estey JJ. was delivered by:

KERWIN J.:—This is an action for damages for breach of a written warranty dated November 20, 1948, given by the respondent to the appellant on the sale, at that date, of an Aberdeen-Angus bull. The warranty is as follows:

> This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

The appellant immediately took delivery of the bull at the respondent's farm near Newmarket, Ontario, and transported it and two other animals in a truck to his farm in Virginia, a distance of 700 or 800 miles, arriving there November 27, 1948. The bull was purchased for breeding but was not used for the purpose until about April 1, 1949, when it was discovered that it then had a deformity which prevented its use as intended.

While a warranty may expressly relate to the future, as when the seller undertakes to deliver horses sound at the end of a fortnight, unless it is so expressly stated, the warranty relates to facts as they were at the time of sale: *Liddard* v. *Kain* (6). Counsel for the appellant did not deny that a warranty ordinarily applied to conditions

(1) (1781) 2 Doug. (K.B.) 732.
(2) (1903) 36 N.S.R. 414.
(3) (1915) 35 O.L.R. 206.
(4) [1927] 4 D.L.R. 223.
(5) [1920] 2 W.W.R. 857; 53 D.L.R. 317.
(6) (1824) 2 Bing. 183.

existing at the time of the sale but contended that the warranty in the present case applied to the future, relying upon the decision of the Court of Session in *Kyle* v. *Sim* (1). There the warranty upon the sale of a dairy cow read as follows:—"Dairy cattle are warranted to calve at their proper time and correct in their teats only." The cow calved at her proper time but, owing to disease which appeared in her teats, her milk supply was defective. That was an entirely different case. He also referred to *Natrass* v. *Nightingale* (2), where the defendant sold the plaintiff a stallion warranting him to be a good coverer and foal-getter, and the animal turned out useless as a foal-getter.

On the other hand, counsel for the respondent cited three cases. In *McGill* v. *Harris* (3), the Supreme Court of Nova Scotia on appeal affirmed the judgment for the defendant on an action on a warranty which warranted a horse:—

> to be sound, and without vice fault or tricks, and a good driving horse in harness for the purposes for which plaintiff desired said horse, which purposes were made known to the defendant at the time of said sale, and before said sale was completed.

There the evidence showed that for a period of eight years prior to the sale, the horse was without fault or tricks but that immediately afterwards, in the hands of the plaintiff, it balked and kicked when in harness and was useless for the purpose for which it was purchased. It was held that the warranty applied only to conditions existing at the time of the sale. In *Eden* v. *Parkison,* (4), Lord Mansfield remarked that there was no doubt that you might warrant a future event but that the question was what was the meaning of the policy of insurance there in question and he concluded that the warranty was that "things stand so at the time; not that they shall continue."

The third case is *Chapman* v. *Gwyther* (5), where the warranty read:—"Warranted sound. Warranted sound for one month," and it was held that the last sentence meant not that the horse was warranted to continue sound for a month but that the duration of the warranty was limited

(1) [1925] S.C. 425.
(2) (1856) 7 U.C.C.P. 266.
(3) (1903) 36 N.S.R. 414.
(4) (1781) 2 Doug. (K.B.) 732.
(5) (1866) L.R. 1 Q.B. 463.

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to one month, and that complaint of unsoundness must be made within one month of sale. At page 467, Blackburn J. states:—

> The words clearly admit of that construction, and taking the general rule, we are to consider what the intention is as expressed by the words used, not as used by anybody, but as used by parties dealing in transactions like the present.

He had already pointed out that the opposite construction would make the bargain a most improvident one and a very unlikely one for any one to enter into.

All of these cases recognize the general rule but were determined upon their particular circumstances. However, I think the remarks of Blackburn J. in *Chapman* v. *Gwyther* are applicable to the present case. The appellant sought to divide the warranty into three separate parts, the past, the present, and future. That is not the correct way in which to read it as I am unable to view the words "I guarantee him to be a breeder for you" as anything more than a warranty that at the date of sale there was nothing to prevent the bull being a breeder for the appellant. Read in that way, these words are not surplusage.

Two experts called by the appellant were of opinion that the deformity was congenital and that, therefore, the animal had always been incapable of penetration. On the latter point these witnesses are contradicted by the evidence of the respondent and his herdsman, and of a neighbour who kept the bull from July, 1948, to about the time of sale. From this evidence it appears that for some time prior to November 20, 1948, the bull had performed its function, and had sired calves on the respondent's farm. As a matter of fact and opinion these witnesses testified that the bull was "right and sound" as of the date of sale. These experts were clearly wrong in their opinion as to the animal's capabilities up to the time of sale and delivery, and the trial judge's rejection of their evidence in favour of the factual testimony and that of Dr. McIntosh, an expert called by the respondent, is fully justified. Although Dr. McIntosh had never seen the animal, he gave cogent reasons which the trial judge found compelling, and with which I agree. In his opinion the condition found could have been caused by an injury. In the absence of any evidence as to the conditions under which the bull was

transported from Newmarket, and in view of the mistake as to facts on the part of the appellant's experts, an injury on the trip to Virginia cannot be ruled out.

On the proper construction of the warranty, even if the onus were upon the respondent of establishing that any injury was not suffered prior to the sale and that there was no congenital defect, that onus has been met. The appeal should be dismissed with costs.

KELLOCK J.:—At the time of the sale of the animal here in question on November 20, 1948, the respondent undertook in writing with the appellant that:

"This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you."

The appellant did not have occasion to use the bull for the purpose for which he acquired it until April of 1949, when the condition of which he complained at the trial was discovered. The evidence establishes that the condition which was later seen in September 1949 and May 1950 by both the experts called on behalf of the appellant was the same as that observed in April 1949.

The case put forward by the appellant in his pleading was that at the date of the sale, the bull was not "then" sound, but was suffering from the condition complained of, which the pleadings describe as congenital. At the trial the appellant called two professional witnesses who stated that, in their view, the defect was congenital and that the animal had never been capable of siring calves. Both stated that in their opinion the defect was not the result of an injury. On the other hand, an expert called by the respondent, although he had never seen the animal in question and had never seen a condition similar to the defect in question, said that such a condition could be a congenital condition or the result of an injury. He also stated that a bull could suffer from a congenital defect which might not at first render him incapable of siring calves. Evidence called on behalf of the respondent, and accepted by the learned trial judge, established that while in the ownership of the respondent, the animal had in fact sired calves.

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The appellant's argument, as disclosed in his factum, was that on the proper construction of the document above set out, the guarantee was not confined to the date of the sale but operated for the future. Counsel contended that it should be found that the condition was not due to injury and, on the basis of Dr. McIntosh's evidence the defect was congenital even though its operation was delayed until after the appellant had acquired ownership.

In my opinion, the statement that "This bull is right and sound in every way to the best of my knowledge", means what it says, namely, that so far as the respondent knew, there was no defect in the animal. The additional words "I guarantee him to be a breeder for you", in my opinion, takes away the effect of the qualification in the earlier language and constitutes an undertaking that, regardless of the respondent's knowledge, the animal was not in fact suffering from any defect at the date of the sale which could prevent him from being a breeder for the appellant.

I think, therefore, that the contention of counsel for the appellant referred to above, would be effective but for the fact that I do not think that the evidence sufficiently excludes the possibility of the condition in question having been brought about by injury subsequent to the date of the sale.

I think, therefore, that the appeal fails and should be dismissed with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario affirming the judgment of Barlow J. whereby the action was dismissed with costs.

The action is for damages for breach of a warranty given on the sale of a bull by the respondent to the appellant. The warranty is in writing. It is dated November 20, 1948, the date of the sale. It is addressed to the agent of the appellant, signed by the respondent, and reads as follows:—

> This is to certify that the Aberdeen-Angus bull, Blackcap of Maple Gables 23rd—85813—has sired calves on my farm. This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.

The appellant's representative took delivery of the bull at the respondent's farm on or about the date of the sale and title thereupon passed to the appellant. The appellant caused the bull to be transported by truck to his farm in Virginia, a distance of between seven hundred and eight hundred miles. Two other animals were carried in the same truck. The appellant did not attempt to use the bull for breeding purposes until April 1, 1949. Commencing on that date repeated attempts were made but all were unsuccessful. On April 18, 1949, the appellant wrote to the respondent complaining that the bull was not as warranted and was useless as a breeder owing to a malformation of its penis. The respondent's solicitor replied denying any liability. His letter reads in part:—

> Any guarantee that may have been given concerned the condition of the animal at the time of the purchase by you. Almost six months have elapsed and you will appreciate the fact that much can happen to an animal during this period of time. The animal, in question, was in good condition at the time of its purchase by you. Mr. Bowser has definite evidence that the animal was satisfactory for breeding purposes immediately prior to you purchasing same. It seems to me that the animal must have been injured, either in it being transported from here to your farm or it must have received injury sometime during the past six months.

The action was commenced on February 11, 1950.

The appellant's cause of action is put as follows in the statement of claim:—

> 3. At the time of the sale the respondent gave a certificate of warranty as to the fitness of the bull for breeding purposes, in these words:
>
> This bull is right and sound in every way to the best of my knowledge, and I guarantee him to be a breeder for you.
>
> 4. When purchased, the bull was in a "highly-fitted condition", i.e. fattened for the show ring, and it was necessary to reduce his weight by 300 pounds, to a normal breeding condition. As the appellant's breeding season did not begin until April, 1949, the services of the bull were not required at any time until that month.
>
> 5. On the first day of April, 1949, and every day thereafter for two weeks, cows were offered to the bull for service, without success, as the bull was unable to make entry.
>
> 6. On April 14th and September 15th, 1949, and on May 5, 1950, the bull was examined by three veterinary surgeons, all of whom stated that the bull was and had always been incapable of serving cows because of a congenital deformity.

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In the statement of defence it is alleged that the bull was sound and had no congenital defects and was a breeder at the time of the sale. The statement of defence continues:

> 5. The Defendant states that if the Aberdeen-Angus bull, which he sold to the Plaintiff, is not now sound and has congenital defects and is not a breeder, all of which the Defendant does not admit but denies, such conditions arose in the said animal after it was placed in the custody and control of the Plaintiff and consequently are not the responsibility of the Defendant.
>
> 6. The Defendant further submits that if he was notified on or about April 15, 1949 of the said bull being unsound, which the Defendant does not admit but denies, the Plaintiff had released the Defendant from any guarantee or warranty, which he may have made in consequence of the eflux of time between the purchase of the said bull and the time of such notice.

In my opinion, it is not necessary to decide whether on its true construction the warranty related to the future or whether, if it did so, it extended so far into the future as April, 1949. The breach of warranty which the appellant assigned in the pleadings and put forward at the trial was not merely that the bull was not a breeder in April, 1949 but that it was then suffering from a congenital deformity which made it impossible that it could ever have served a cow or been a breeder. It at once becomes obvious that if this proved to be the fact the bull could not have complied with the warranty at the date of the sale and could not then, or indeed ever, have been right and sound or a breeder. This was the case which the respondent was called upon to meet. He met it by the evidence of several witnesses, expressly accepted by the learned trial judge, to the effect that the bull had served a number of cows in a normal manner, that it had sired a number of calves including one born as a result of service on November 1, 1948, which was the latest occasion of service deposed to, and that its penis was "perfectly normal".

The learned trial judge found that the bull conformed to the warranty when delivery was made. There was ample evidence to support this finding and it is destructive of the theory that the bull had always been incapable of breeding on which the appellant based his case at the trial.

There was no contradiction of the evidence given on behalf of the appellant that from April 1, 1949, the bull had proved incapable of breeding. The explanation suggested by the learned trial judge is that the bull may very

well have suffered an injury on the trip by truck to Virginia or during the period between November, 1948, and April 1949. No witness suggested that the condition could have arisen spontaneously during the life of the bull. Only two possible explanations were put forward, one that the condition was congenital, the other that it was the result of injury. While the two veterinary surgeons called by the appellant were of opinion that the condition was not caused by injury and must be congenital it is clear that the learned trial judge did not accept their views. Dr. McIntosh, a veterinary surgeon called by the respondent, was of the opinion that the condition could have resulted from injury. Neither the trucker who transported the bull to Virginia nor the veterinary surgeon who examined the bull in April, 1949, and to whom reference is made in the statement of claim and in the appellant's letter of April 18, 1949, were called as witnesses. One of the veterinary surgeons called by the appellant had first examined the bull on September 15, 1949, and the other on May 5, 1950. Whatever may be the true construction of the warranty, I do not think that the respondent could be charged with a breach thereof if the bull was "right and sound in every way" and "a breeder" at the time of delivery but later ceased to be so because of an injury suffered after delivery when it was owned by and in the possession of the appellant, and this is the only theory on which its condition at the time of the trial can be reconciled with the finding of the learned trial judge that it conformed with the warranty at the time of delivery.

On conflicting evidence the learned trial judge has found that the breach of warranty which the appellant pleaded and on which he based his case at the trial has not been established. This finding has been concurred in by the Court of Appeal, and, in my opinion, it should be upheld. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. H. Young.*

Solicitor for the respondent: *L. C. Lee.*

1951

*Oct. 31.
*Dec. 3.

CITY OF VERDUN (DEFENDANT).....APPELLANT;

AND

SUN OIL COMPANY LTD. (PETITIONER)..RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Mandamus—Municipality—Refusal by Council to grant permit for erection of service station—Section 76 of municipal by-law 128 of City of Verdun gives Council discretion to grant or refuse permit—Whether such discretionary power ultra vires—Whether mandamus is right procedure to have it so declared—Whether petitioner has legal interest to bring action—Cities and Towns Act, R.S.Q. 1941, c. 233, ss. 424, 426 and 429—Arts. 50, 77 and 992 C.P.C.

The respondent, pursuant to s. 76 of by-law 128 of the City of Verdun, applied to the appellant for permission to erect a service station in the City. In the immediate locality were then already located three like establishments operated by different competitor companies. The application was rejected by a resolution of the Council of the City, notwithstanding that all the requirements of s. 76 had been fully complied with and that the Building Inspector of the City had transmitted to the Council a favourable certificate. Proceedings were then instituted by way of mandamus to challenge the validity of s. 76 in so far as it purported to give the Council a discretionary power to grant or refuse the permit, to ask that that portion of s. 76 be declared *ultra vires* the powers of the City as delegated to it under the *Cities and Towns Act* (R.S.Q. 1941, c. 233), and to compel the granting of the permission. In the Superior Court, the City was successful, but the majority in the Court of Appeal for Quebec declared null and void, as *ultra vires,* the above mentioned portion of s. 76.

Held, dismissing the appeal, that the portion of s. 76 of by-law 128 of the City of Verdun, purporting to give the Council a discretionary power to grant or refuse the permit, was *ultra vires* the powers of the City as delegated to it by s. 426 of the *Cities and Towns Act.* The municipalities, deriving their legislative powers from the provincial Legislature, must frame their by-laws strictly within the scope delegated to them; but the City, by enacting s. 76, effectively transformed its delegated authority to regulate by legislation into a mere administrative and discretionary power to grant or cancel by resolution the permit provided for in the by-law. (*Phaneuf* v. *Corp. du Village de St-Hughes* (1) and *Corp. du Village de Ste-Agathe* v. *Reid* (2) referred to).

Held further, that the City, having fought its case on the assumption, sufficiently justified by the record, that the plaintiff had a legal interest in the action, is now bound by the manner in which it conducted its defence and cannot therefore gain a new ground in law. (*The Century Indemnity Co.* v. *Rogers* (3) and *Sullivan* v. *McGillis* (4) followed).

*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

(1) Q.R. (1936) 61 K.B. 83.
(2) Q.R. 10 R. de J. 334.
(3) [1932] S.C.R. 529 at 536.
(4) [1949] S.C.R. 201 at 215.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing, St-Jacques and Barclay JJ.A. dissenting, the decision of the trial judge and holding that part of s. 76 of by-law 128 of the City of Verdun was *ultra vires*.

L. J. de la Durantaye K.C. and Maurice Fauteux K.C. for the appellant. The principle laid down in *Phaneuf* v. *Corp. du Village de St-Hughes* (2) is undisputed except as to the use of the word "strictly". The legislator cannot anticipate every case down to its smallest details. Therefore, in order to be *intra vires*, a by-law need only to be within the general powers given by the Legislature.

Under the terms of Art. 426 of the *Cities and Towns Act*, if the Council could determine by by-law the locality for a particular industry, it certainly could authorize the Council to do so by resolution. If Art. 426 did not authorize the Council to enact s. 76, then Art. 424 gives the municipality powers general enough to enact it. This authority can also be found under Art. 429(22) of the *Cities and Towns Act*. The good administration of the City requires such a discretion which, the evidence reveals, was properly exercised. Furthermore, if the Building Inspector, under the terms of Art. 426 of the *Act*, has a discretion in the granting or refusing of the permit, why not the Council?

Assuming then that the Council could, in its discretion, grant or refuse the permit, the Courts cannot intervene and substitute their discretion to the Council's: *Noël* v. *Cité de Quebec* (3) and *Quinlan* v. *City of Westmount* (4).

Subsidiarily, even if the City had exceeded its jurisdiction, the respondent could not by way of mandamus ask that the portion of s. 76 be declared null. There is no act or duty incumbent upon the City by-law to grant the permit (Art. 992 C.P.C.). Quite the contrary, s. 76 leaves it to the discretion of the Council. Even if that part of s. 76 is erased, there is still no stipulation of the law to oblige the Council to grant the permit. The mandamus was not the most effectual remedy as required by Art. 992 C.P.C. (*Kearns* v. *Corp. of Low* (5) relied on).

(1) Q.R. [1951] K.B. 320.
(2) Q.R. (1936) 61 K.B. 83.
(3) Q.R. 64 S.C. 260.
(4) Q.R. 23 R.L. (N.S.) 411.
(5) Q.R. 28 R.J. 498.

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Furthermore, in order to proceed by mandamus, the respondent needed to have at least an eventual interest which had to exist at the time of the taking of the action. The respondent was not at that time owner nor lessee. (*Perron* v. *Corp. du Sacré-Coeur de Jésus* (1), *Noël* v. *Cité de Québec* (2), *Clegg* v. *MacDonald* (3) and *Re Workmen's Compensation Act* (4) relied on).

G. C. Papineau-Couture K.C. and R. C. Harvey for the respondent. A power to grant or refuse at will the permit is *ultra vires*. So soon as an applicant has established fulfilment of all the requirements of the by-law, the municipality is in duty bound to grant the permit by the provisions of Art. 426 of the *Cities and Towns Act*. It matters not whether the power to issue permits is given by by-law to a designated officer or to the Council, the principle is the same. Clearly the City must proceed not by resolution but by by-law. It must follow its prescriptions and cannot alter or disregard the same. Otherwise, the Council administers and legislates by simple resolution where the governing statute orders this to be done by by-law and specifically forbids any change or alteration unless a modifying by-law is adopted by the secret vote of the interested proprietors. (*Phaneuf* v. *Corp. du Village de St-Hughes supra*). Such an arrogation of discretionary powers was condemned in clear, strong and definite language in *Corp. du Village de Ste-Agathe* v. *Reid supra*. The same principle was upheld in *Baikie* v. *City of Montreal* (5) and *Murray* v. *District of Burnaby* (6).

The City has the right to regulate and locate establishments, but this can only be done by a general by-law and not by a so-called discretion under a building by-law. When the conditions of the by-law have been complied with, a mandamus will lie to compel the granting of the permit: *Rosenfelt* v. *Biron* (7). The way s. 76 has been interpreted, it opens every door to arbitrariness, discrimination and injustice. The cases of *Jaillard* v. *City of Montreal* (8) and *Phaneuf supra* are also relied on.

(1) Q.R. 44 K.B. 400.
(2) Q.R. 64 S.C. 260.
(3) (1918) 39 D.L.R. 130.
(4) [1938] 3 D.L.R. 795.
(5) Q.R. (1937) 75 S.C. 77.
(6) [1946] 2 D.L.R. 541.
(7) Q.R. 43 S.C. 127.
(8) Q.R. (1934) 72 S.C. 112.

The respondent's interest in obtaining a permit clearly appears from a perusal of the petition and from the evidence. The appellant never raised the ground up to now of lack of interest. By-law 128, s. 76, does not restrict applications for a permit to any category of individuals. The appellant knew that an option had been obtained on the site and that considerable time and money had been spent in negotiating for the purchase of the property. The interest of the respondent is evidenced by the prejudice caused by the refusal of the permit: *Quebec Paving Co.* v. *Senecal* (1); *Gingras* v. *Corp. du Village de Richelieu* (2) and *Hyde* v. *Webster* (3).

L. J. de la Durantaye K.C. replied.

The judgment of the Court was delivered by

FAUTEUX J.—The respondent, hereinafter also called "the Company", carries on business throughout Canada and more particularly in the judicial district of Montreal, as vendor and distributor of motor fuels and oils, auto accessories, and as operator of motor vehicle service station, both as owner and lessee thereof.

Towards the end of December 1949, and pursuant to section 76 of by-law 128 of the by-laws of the appellant, hereinafter also referred to as "the City", the Company applied to the latter for permission to erect a service station and sales shop on an emplacement at the intersection of Bannantyne and Fifth Avenues in the city of Verdun. In this immediate locality were then already located three like establishments operated by different competitor companies.

Section 76 is entitled "Specially Restricted Buildings". Briefly, paragraph (*a*) thereof prescribes that

> Any person wishing to erect or use a building or any premises or to occupy a lot of land for . . . gasoline stations . . . shall make an application in writing to the City to do so.

Paragraphs (*b*), (*c*) and (*d*), in which the parts more relevant to this issue are underlined, may conveniently be quoted in full:—

> (*b*) *Any person who wishes* to obtain such permission shall make an application to that effect to the Building Inspector who shall transmit a copy of such application to the City Clerk. The latter

(1) Q.R. (1934) 57 K.B. 23. (2) Q.R. (1939) 66 K.B. 247.
(3) (1914) 50 Can. S.C.R. 295.

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shall give at least ten (10) days public notice of said application by means of an advertisement in at least two local newspapers, one English and one French, in which the City usually publishes its advertisements, the said notice to be also posted by the applicant in a conspicuous place on the lot of land, building or premises proposed to be used for such purpose, so that the neighboring proprietors or residents or other parties interested may have an opportunity of opposing the granting of such a permission. The above mentioned poster shall be supplied by the Building Inspector Department. No such application shall be entertained by the City unless notice thereof be previously given as hereinabove provided nor unless applicant binds himself, in writing, to equip the boilers, engines, motors or furnaces which he proposes to set up with smoke and gas consumers such as will efficiently free the same from smoke and all that may, in their use, be harmful to the public.

(*c*) Upon the receipt of any such application the Building Inspector shall inspect the lot of land, building or premises, or examine the plan of the building or premises proposed to be used for any of the purposes set forth in Section 76 of this By-Law and, if satisfied that such building or lot of land meets the requirements of this By-Law and that the permission applied for may be granted without in any way endangering life or property, he shall transmit a certificate to this effect to the City Council, *which may, at its discretion, grant or deny the permission applied for.*

(*d*) Whenever any such application is made to the Building Inspector, the applicant shall deposit at the City Treasurer's Office a sum of ten dollars ($10) to cover the cost of advertisements and other expenses incurred by the City in connection with such application.

First considered on the 14th of February 1950, and again—the Company having protested the first decision—on April 2, 1950, the application of the latter was, on each occasion, rejected by a resolution of the Council of the City. No reason for such refusal was expressed in the resolutions or, then, otherwise conveyed to the Company. It was however conceded, before this Court, by counsel for the appellant, that all the requirements of the section had been fully complied with by the Company and that the Building Inspector of the City had issued and transmitted to the Council a favourable certificate, i.e., a certificate attesting that the requirements of the by-law were met and that the permission applied for could "be granted without, in any way, endangering life or property." The refusal of the Council of the City rested, therefore, solely on the exercise of such discretion as it may have under paragraph (*c*) to grant or deny the permission applied for.

The respondent thereupon instituted proceedings by way of mandamus, challenging the validity of the section insofar as it purports to vest in the Council of the City the right to grant or deny, at its discretion, the permission applied for notwithstanding that, admittedly, all the requirements of the by-law had been met, prayed the Court to declare the same *ultra vires* the powers of the City as delegated to it under the *Cities and Towns Act* (R.S.Q. 1941, c. 233), and requested an order for the issue of a peremptory writ of mandamus to compel the granting of the permission.

Before the Superior Court, the City successfully contested these proceedings. Briefly it was held that the Court could not declare section 76 *ultra vires* the City, the evidence, in the premises, failing to reveal any abuse of powers, or unlawful or arbitrary action on behalf of the Council of the City; that the reasons—traffic density and hazards—given in defence by the City for such refusal, were well founded; and that, in the circumstances, the discretion was properly exercised.

By a majority judgment (Gagné, McDougall and Bertrand JJ.A.), the Court of King's Bench (Appellate Division) (1) declared null and void, as *ultra vires,* that portion of section 76 of by-law 128, which purports to give a discretion to the Council to grant or deny permission under the said by-law; annulled likewise the two resolutions of the Council refusing to grant a permit to the Company; and ordered the issue of a peremptory writ of mandamus. St-Jacques and Barclay JJ.A., dissented; holding, the former, that the Company had not established its right to the issue of a permit, and the latter, that the Company had not established any right or interest entitling it to bring the action.

Challenging the judgment of the Court of Appeal, counsel for the appellant rested his case on only two grounds.

As to the first: Counsel contented himself with asserting that, under paragraph (*c*) of the section, the Council had discretion to grant or deny the permission. Of that there can be no doubt. But the real point, successfully pleaded by the Company before the Court of Appeal, is that—and precisely for that reason and to that extent—the section

(1) Q.R. [1951] K.B. 320.

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is *ultra vires* of the City. In this respect, the Judges of the minority in the Court below said nothing, nor did counsel for the appellant, before us, make any attempt, though invited, to challenge the majority judgment of the Court of Appeal. In the appellant's factum, however, this point is dealt with and must, therefore, be considered.

That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature, are undisputed principles. In the very words of Sir Mathias Tellier, the then Chief Justice of the Province of Quebec, in *Phaneuf* v. *Corporation du Village de St-Hughes* (1):

> En matière de législation, les corporations municipales n'ont de pouvoirs que ceux qui leur ont été formellement délégués par la Législature; et ces pouvoirs, elles ne peuvent ni les étendre, ni les excéder.

In the present issue, it appears, from the factum of the appellant, that sections 424, 426 and 429 of the *Cities and Towns Act*, R.S.Q. 1941, c. 233—admittedly governing the City of Verdun—are the only ones upon which any reliance is placed as authority, delegated by the Legislature to the City, to enact the portion, here in issue, of section 76 of by-law 128. The parts of the sections relied on are:—

> 424.—The Council may make by-laws:
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> 1. To secure the peace, order, good government, health, general welfare and improvement of the municipality, provided such by-laws are not contrary to the laws of Canada, or of this Province, nor inconsistent with any special provision of this Act or of the charter;
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> 426.—The Council may make by-laws:
>
> 1. To regulate the height of all structures and the materials to be used therein; to prohibit any work not of the prescribed strength and provide for its demolition; to prescribe salubrious conditions and the depth of cellars and basements; to regulate the location within the municipality of industrial and commercial establishments and other buildings intended for special purposes; to divide the municipality into districts or zones of such number, shape and area as may appear suited for the purpose of such regulation and, with respect to each of such districts or zones, to prescribe the architecture, dimensions, symmetry, alignment and use of the structures to be erected, the area of lots, the proportion which may be occupied by and the distance to be left between structures; to compel proprietors to submit the plans of proposed buildings to a designated officer and to obtain a certificate of approval; to prevent or suspend the erection of structures not conforming to such by-laws and to order the demolition, if necessary, of any structure erected contrary to such by-laws, after their coming into force.

(1) Q.R. (1936) 61 K.B. 83 at 90.

429.—The Council may make by-laws:

Subsection 22. To remove and abate any nuisance, obstruction, or encroachment upon the side-walks, streets, alleys and public grounds, and prevent the encumbering of the same with vehicles or any other things;

In the formal judgment of the Court of Appeal, it is stated that section 426 above is the only provision, under the *Cities and Towns Act*, from which the authority to enact section 76 of the by-law, or a one similar, may be derived. And there is no doubt that amongst the sections quoted above and invoked in the appellant's factum, it is the only one which specially deals with the subject matter of the questioned by-law. It is common ground, it may be added, that, except in the measure in which it purports to have done so under section 76 of by-law 128, the City has not seen fit to adopt any by-law regulating the location, within the municipality, of industrial and commercial establishments, and other buildings intended for special purposes, nor did it, in any manner, attempt to divide the municipality into districts or zones.

The mere reading of section 76 is sufficient to conclude that in enacting it, the City did nothing in effect but to leave ultimately to the exclusive discretion of the members of the Council of the City, for the time being in office, what it was authorized by the provincial Legislature, under section 426, to actually regulate by by-law. Thus, section 76 effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which, untrammelled in the absence of any by-law, could only, in a proper one, be regulated. This is not what section 426 authorizes. Furthermore, the second paragraph of the latter section prescribes that "no by-law made under this paragraph 1 may be amended or repealed except by another by-law approved by the vote, by secret ballot, of the majority in number and in value of the electors who are owners of immoveable property situated in each district or zone to which the proposed amendment or repeal applies." This provision supports the proposition that, once exercised, the delegated right to regulate, in the matters mentioned in paragraph 1 of section 426, is to be maintained at the legislative level and not to be brought down exclusively within the administrative field, as it was in the present instance. If it was within the power of the City to do

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what it did, this prohibition, prescribed in the second paragraph of section 426, would be nugatory.

The comments of Sir Melbourne Tait, then A.C.J., in *Corporation du Village de Ste-Agathe* v. *Reid* (1), quoted by Gagné J.A., and approved by McDougall and Bertrand JJ.A., are to the point. At page 337, the learned jurist, speaking for the Court of Review, said:

> A by-law is passed after certain formalities, and while in force is general in its application; it is published and is known to the ratepayers of the municipality, whereas a resolution may be passed without such publicity. Moreover, the composition of the council changes from time to time, the conditions might be changed from meeting to meeting, and the council would then have it in its power to permit one person to erect a saw-mill propelled by steam, upon certain conditions, and in a certain locality, and refuse the same rights to others.
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> The permission to erect and conditions would thus be subject to the mere whim of the persons who might form the council of any particular meeting . . . It (the by-law) opens the door to discrimination and arbitrary, unjust and oppressive interference in particular cases. It is not really a by-law at all, but a declaration that the council may permit the erections referred to in art. 648 upon such conditions as it may think proper to make at any particular meeting. The rights of those who may desire to erect such manufactories or machinery are left uncertain, and it appears to me this so-called by-law is drawn contrary to the elementary principles upon which an ordinance of that kind ought to be made, . . . For this reason alone, . . . I am of opinion that the judgment should be reversed . . .

These considerations are sufficient to dismiss the first ground raised by the appellant.

The second ground, advanced against the judgment of the Court of Appeal, appears in the reasons of the minority Judges (2). Briefly, it was argued before us that, there being no allegation in the declaration nor any evidence on record that it had any kind of property rights within the territory of the City and particularly on the lot of land upon which it proposes to erect a gasoline station, the Company was denuded of the legal interest required under section 77 of the *Civil Code of Procedure* to bring the action.

The section reads:—

> No person can bring an action at law unless he has an interest therein. Such interest, except where it is otherwise provided, may be merely eventual.

As stated in the reasons for judgment of Gagné J.A., with whom McDougall and Bertrand JJ.A., agreed, this

(1) Q.R. 10 R. de J. 334. (2) Q.R. [1951] K.B. 320.

ground was never raised by the City at trial or even in its factum before the Court of Appeal, nor was it dealt with in the judgment of the trial Judge, but appeared for the first time in the reasons for judgment of the minority. Indeed, and having disposed of the other points in the case, Mr. Justice Gagné says:—

> Depuis que ce qui précède est écrit, j'ai reçu les notes de M. le Juge St-Jacques et M. le Juge Barcley où l'on soulève, pour la première fois, la question d'intérêt de la requérante.

It is quite true that, the provisions of section 77 of the *Civil Code of Procedure* being provisions of public order, the absence of interest to bring an action may be raised at any stage of the proceedings by the parties, or even by the Court *proprio motu*. The City, however, has fought the case on the manifest assumption that the plaintiff had a legal interest in the action, and the appropriateness of this assumption is further sufficiently justified by the material in the record. Thus, amongst other facts, it appears: that the Company has "spent considerable time and money in negotiating the purchase" of the property; that on its application for the permit, it described itself as "future owner"; that through counsel, it protested in a lengthy letter to the City the first refusal of its application and thus obtained a reconsideration of it; that the second refusal was followed by the present action. A reasonable inference of all these facts is that the Company had, when it brought its action, a *jus ad rem* with respect to the land. And there is nothing in the pleadings or on the evidence suggesting that this inference was not common ground between the parties. The City cannot now adopt, before this Court, a different view on the facts to gain a new ground in law; it is bound by the manner in which it conducted its defence. (*The Century Indemnity Company* v. *Rogers* (1). *Sullivan* v. *McGillis and others* (2)).

I would dismiss the appeal, maintain and re-affirm the conclusions of the formal judgment of the Court of King's Bench (Appellate Division); the whole, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fauteux, Blain & Fauteux.*

Solicitors for the respondent: *Campbell, Weldon, McFadden & Rinfret.*

(1) [1932] S.C.R. 529 at 536. (2) [1949] S.C.R. 201 at 215.

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*Nov. 29, 30
*Dec. 17.

PAUL LEMAY .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal Law—Evidence—Sale of drugs—Denial by accused—Proof of identification—Duty of Crown as to calling witnesses—Whether notice of appeal must be signed by Attorney General—Power of Court of Appeal to reverse acquittal and enter conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49—Criminal Code, ss. 1013(4), 1014, 1023(2).

The appellant was charged with having unlawfully sold a drug. The evidence for the prosecution was that Bunyk, an officer of the R.C.M.P., saw the accused, who was already known to him, sitting at a table in a restaurant. Bunyk, who was at the time accompanied by an informer, one Powell, could not say whether Powell saw the accused or not. Bunyk entered the restaurant alone and sat down beside the accused at whose table one Lowes was also sitting, and thereupon purchased the drug from the accused. Neither Powell nor Lowes was called as a witness. The accused denied that he was the man from whom the purchase was made and testified that he was not present, he also denied any knowledge of any person named Lowes. The proceedings were by way of speedy trial, and the trial judge, although stating that he disbelieved the accused, acquitted him because of the failure of the prosecution to call Lowes or account for his absence. The appeal taken by the Crown was allowed and a conviction entered.

Held: The appeal should be dismissed (Cartwright J., dissenting in part, would have ordered a new trial).

Held, that counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive (of which there is here no suggestion). This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. The appeal should be dismissed since there was no obligation on the Crown to call either Powell or Lowes at the trial. (*Adel Muhammed El Dabbah* v. *A.G. for Palestine* [1944] A.C. 156 applied; *Rex* v. *Seneviratne* [1936] 3 All E.R. 36 explained).

(*Rex* v. *Lemay* (100 Can. C.C. 367), a decision of the Court of Appeal for British Columbia in an appeal by the same accused from his previous conviction on the same charge and ordering a new trial, overruled).

Per Locke J.: Since the *Criminal Code* is silent, the Criminal Law of England as it existed on the 19th day of November, 1858, governs the matter. If what appears to have been considered as a rule of practice prior to 1858 had become part of the common law of England, the

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

principle applicable was as stated in *R.* v. *Woodhead* (1847) 2 C. & K. 520, and *R.* v. *Cassidy* (1858) 1 F. & F. 79, and the Crown was under no obligation to call either Powell or Lowes as a witness. (*R.* v. *Sing* (1932) 50 B.C.R. 32 and *R.* v. *Hop Lee* (1941) 56 B.C.R. 151 referred to).

Held also, that since it is not expressed either explicitly or inferentially in s. 1013(4) of the *Criminal Code* that the Attorney General should personally sign the notice of appeal to the Court of Appeal, there is no substance to the objection that the notice was signed by B. as agent for the Attorney General of British Columbia. (Locke J. agreed with Robertson J.A. that the signature by the agent was sufficient since the appeal was substantially and actually in the name of, and for, the Attorney General of British Columbia).

Held further, following *Beleyea* v. *The King* [1932] S.C.R. 279, that the Court of Appeal had the power to enter a conviction, it appearing that not only did the trial judge not accept or believe the accused's testimony but he believed and accepted the evidence of the R.C.M.P. officer, and that he dismissed the charge only because he considered wrongly that the Crown had to call Lowes or account for his absence. (Cartwright J., dissenting in part, would have ordered a new trial on the ground that it did not appear certain but only probable that the trial judge would have convicted but for his erroneous ruling on the point of law).

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, O'Halloran J.A. dissenting, the Crown's appeal from the accused's acquittal at trial on a charge of unlawful sale of drugs.

J. Stevenson Hall for the appellant. S. 1013(4) of the *Criminal Code* gives the right of appeal to the Attorney General and the power to appeal cannot be delegated by the Attorney General. Therefore the notice of appeal to the Court of Appeal signed by B. as agent for the Attorney General of British Columbia was not proper in form and in accordance with s. 1013(4) of the Code (*Rex* v. *Gallant* (2) and *Rex* v. *Perry* (3)).

Powell and Lowes were essential Crown witnesses who were present throughout the major part of the transaction of selling between Lemay and Bunyk, and should, therefore, have been called as witnesses. The appellant relies in this respect upon the dissenting judgment of O'Halloran JA. and the cases therein referred to, and specially to *Rex* v. *Seneviratne* (4) and *Rex* v. *Guerin* (5).

(1) 100 Can. C.C. 365.
(2) [1945] 1 D.L.R. 471.
(3) [1945] 4 D.L.R. 762.
(4) [1936] 3 W.W.R. 360 at 378.
(5) (1931) 23 C.A.R. 39 at 42.

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The Court of Appeal erred in directing a conviction to be entered. If the setting aside of the acquittal is upheld, a new trial should be directed, since it does not appear from the judgment of the trial judge that he was satisfied of facts which proved the accused guilty. He stated that he disbelieved the accused but does not state expressly, nor does it follow by irresistible inference from anything he does say, that he accepted the evidence of Bunyk. He does not say that, but for the rule of law which he applied, he would have found the accused guilty. It is not certain that he would have convicted the accused. (*Rex* v. *Gun Ying* (1) and *Rex* v. *Tonelli* (2)).

Douglas McKay Brown for the respondent. The narrative had been completely unfolded by Bunyk. The evidence of Lowes was not essential to the unfolding of the narrative and under the circumstances of the evidence, the Crown was not obliged to call him as a witness. There was no duty on the part of the Crown to call Lowes, who was associating with the accused, a known criminal engaged in the drug traffic. From the principles laid down in *Rex* v. *Seneviratne* (*supra*) and *Rex* v. *Hop Lee* (3), it is clear: (*a*) There is no general obligation on the part of the Crown to call every available witness; (*b*) Their Lordships refused to lay down any rule to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case; (*c*) That, speaking generally, they could not approve of an idea that the prosecution must call witnesses irrespective of consideration of number, and of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence; (*d*) Witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution. Under the circumstances of the present case, it was not mandatory on the part of the Crown to call Lowes or Powell as a witness. In the case of *Adel Muhammed El Dabbah* v. *A.G. for Palestine* (4), it was stated that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the Court will not interfere with the exercise of that discretion unless, perhaps, it

(1) 53 Can. C.C. 378 at 380.
(2) 99 Can. C.C. 345.
(3) (1941) 56 B.C.R. 151.
(4) [1944] A.C. 156.

can be shown that the prosecutor has been influenced by some oblique motive. There is no suggestion of such a motive here. The Crown, therefore, exercised that discretion in not calling Powell or Lowes as witnesses.

There is a distinction to be made between the Crown's duty of calling witnesses and the question of identification.

In view of the decision of this Court in *Beleyea* v. *The King* (1), the Court of Appeal had the power to convict the accused. Since the trial judge would have convicted if he had not considered that in law he could not, therefore the Court of Appeal was right in doing what it did.

S. 1013(4) of the Criminal Code does not say that the notice of appeal to the Court of Appeal must be signed personally by the Attorney General. It is sufficient if the appeal is substantially and actually taken in the name of the Attorney General. The present case is different from that of *Rex* v. *Gallant* (*supra*) cited by the appellant.

The case of *Rex* v. *Lee Fong Shee* (2) is cited to show the clandestine nature of the drug traffic and the difficulty to obtain a conviction.

The judgment of the Chief Justice and of Kerwin, Taschereau, Kellock, Estey and Fauteux JJ. was delivered by

KERWIN J.:—The appellant Lemay was charged with having sold a drug to Steven Bunyk, on September 21, 1950, at Vancouver contrary to the provisions of the *Opium and Narcotic Drug Act, 1929,* as amended. Lemay was tried on that charge and acquitted by His Honour Judge Sargent in the County Court Judges' Criminal Court. On an appeal by the Crown to the Court of Appeal for British Columbia (3) that acquittal was set aside, a conviction entered, and the case remitted to the trial judge for sentence. Under subsection 2 of section 1023 of the *Code* as enacted by section 30 of chapter 55 of the Statutes of 1947, Lemay now appeals to this Court alleging that his conviction was erroneous on two grounds (*a*) the Court of Appeal erred in finding that it was not essential that the Crown call as a witness one Henry Powell, a Royal Canadian Mounted Police informer, and one Art Lowes, both of whom it was alleged were present throughout the

(1) [1932] S.C.R. 279. (2) 60 Can. C.C. 73.
(3) 100 Can. C.C. 365.

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major part of the transaction of selling between the appellant and Bunyk; (*b*) the notice of appeal to the Court of Appeal, which was signed "Douglas McKay Brown, Agent for the Attorney General of British Columbia", was not proper in form or in accordance with section 1013(4) of the *Criminal Code* as enacted by section 28 of chapter 11 of the Statutes of 1930. These grounds will be considered in order.

Steven Bunyk, who is a member of the Royal Canadian Mounted Police, testified that he had known Lemay by sight for some time previous to 21st September, 1950, having seen him on about twelve occasions and having seen his picture several times. He described Henry Powell as a coloured boy used by the Royal Canadian Mounted Police and paid by them as an informer. Powell had pointed Lemay out to Bunyk on the street, and on September 20, the two of them went to see Lemay in room 10 in a rooming house in Vancouver known as the Beacon Rooms. Failing to find Lemay there, Bunyk, still accompanied by Powell, proceeded to depart when he saw Lemay at the head of the stairs leading to the ground floor, whereupon Lemay said to Bunyk: "I thought you were coming as I saw you pass the cafe several times." Nothing else was said upon that occasion.

On the next day, September 21 (the date of the alleged offence), Bunyk and Powell walked in a westerly direction, on the south side of Hastings Street, towards the Malina Cafe. The door to the cafe is on the east side of the cafe with a window immediately to the west. Bunyk looked through that window and saw Lemay sitting in a booth on the west side of the cafe. Bunyk could not say that Powell saw the accused. Bunyk entered the cafe and sat down near Lemay in the booth and there the transaction occurred, which is the basis of the charge. It is not denied that on that occasion Bunyk paid three dollars and received the drug but Lemay denied that he was the man from whom the purchase was made and testified that he was not present. Also sitting in the booth was the other man referred to, known to Bunyk as Art Lowes. The accused denies any knowledge of such a person. He denies knowing Bunyk or seeing or speaking to him on September 20 or 21. He admits that he lived in room 10 in the Beacon Rooms

for some time prior to September 20 but states he moved from there on that date. While he says he was away from Vancouver during parts of August and September, he admits being in the city on September 20 and 21 and that on some occasions he had taken his meals at the Malina Cafe.

Neither Powell nor Lowes was called as a witness. For some time prior to September 20, Bunyk was acting as an under cover agent and he stated that Powell came from the United States and that he did not know where he was. Then the following question and answer appear in the record:—

Q. Do you know of any inquiries which have been made to locate him?

A. Inquiries were made to the Federal Bureau of Narcotics in Seattle but they have failed to locate him.

As to Lowes, Bunyk testified that he knew him to see him but that he had no idea how Lowes happened to be with Lemay on September 21 and that Lowes had no connection with the case as far as the Royal Canadian Mounted Police was concerned and that Lowes was not an operator for that organization.

Prior to the hearing before His Honour Judge Sargent, Lemay had been convicted on the same charge by His Honour Judge Boyd, but that conviction was set aside by the Court of Appeal (1), consisting of O'Halloran, J.A., Robertson, J.A., and Sidney Smith, J.A. (dissenting), on the ground that Powell had not been called as a witness. On the Crown's appeal from the acquittal on the new trial, Sidney Smith, J.A., adhered to the view that he had expressed on the prior appeal, while Robertson, J.A., decided that on the second trial it appeared that Powell had not looked through the window. As to Lowes, he considered that the fact that that individual was associated with a drug pedlar, as Lemay was found to be, probably convinced the Crown that his evidence would not be reliable. He pointed out that the fact that Lowes was present was made known at the preliminary hearing and, notwithstanding this, counsel for Lemay did not ask that Lowes be subpoenaed or for an adjournment to permit him to have him before the Court, and that the Court was not bound to discharge the functions of the defence. O'Halloran J.A.

(1) 100 Can. C.C. 367.

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dissented. He retained the view he had held on the prior appeal as to Powell because he considered the explanation of Powell's absence was of a vague and general character. That view was to the effect that there is a rule whereby the Crown was bound to call Powell as a witness essential to the unfolding of the narrative. He also considered that it was difficult to avoid the reflection that if Lowes could have identified Lemay, the Crown would not have failed to call him, particularly since the Crown knew from the first trial that Lemay denied being in the cafe and, therefore, on the same basis, that the Crown was bound to call him as a witness. He proceeded further to deal with what he described as a fundamental aspect, viz., the trial judge's attitude towards Lemay's testimony. These views of the learned Justice of Appeal cannot be accepted since it is plain upon a reading of the reasons of the trial judge that he believed the evidence of Bunyk and certainly he categorically stated that he did not believe the evidence of Lemay. The trial judge had the witnesses before him and it was not necessary that he itemize the reasons which led him to conclude that Lemay's evidence was not to be believed.

While certain decisions in the British Columbia Courts are referred to in the reasons for judgment in the Court of Appeal, as well on the first appeal as on the second, all the arguments on behalf of Lemay in connection with the first ground of appeal are garnered from the following statement in the judgment of Lord Roche, speaking on behalf of the Judicial Committee in *Seneviratne* v. *Rex* (1). "Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution." Now, in addition to this statement being *obiter* as Lord Roche clearly stated, it also appears from page 48 of the first report and page 377 of the second, that he was dealing with the case of the maid Alpina (and similar cases) whose good faith was not questioned by the Crown, and pointed out that what she had said was given apparently without previous cross-examination as to other and previous oral state-

(1) [1936] 3 All E.R. 36 at 49;
3 W.W.R. 360 at 378.

ments. It was pointed out that this was both undesirable and not permitted by any sections of the Ceylon Law of Evidence Ordinance. Lord Roche continued:

> It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as *Ram Ranjan Roy* v. *R.* ((1914) 1 L.R. 42 Calc., 422: 14 Digest 273, 2816 (ii)) to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination.

Then follows the statement relied on. In truth Lord Roche was dealing with an entirely different matter, and reading the whole of his reasons it is clear that not only was he not laying down any such rule as that here asserted but one directly contrary to it.

It is made abundantly plain from the subsequent decision of the Judicial Committee in *Adell Muhammed* v. *A.G. for Palestine* (1), delivered by Lord Thankerton (which was not brought to the attention of the Court of Appeal), that no such rule as has been contended for, and apparently applied by the majority of that Court on the first appeal and by the dissenting judge on the second appeal, has ever been laid down. The earlier cases are referred to in the argument of counsel for the accused in the Palestine case but *Seneviratne* v. *Rex* is not mentioned. At pages 167, 168 and 169, Lord Thankerton deals with the contention that the accused had a right to have the witnesses whose names were on the information but who were not called to give evidence for the prosecution, tendered by the Crown for cross-examination by the defence. Their Lordships agreed with the trial judge and the Court of Criminal Appeal in Palestine that there was no obligation on the prosecution to tender these witnesses. However, while the Court of Criminal Appeal had held that that was the strict position

(1) [1944] A.C. 156.

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in law, they expressed the opinion that the better practice was that the witnesses should be tendered at the close of the case for the prosecution so that the defence might cross-examine them if they wished, and the Court desired to lay down as a rule of practice that in future this practice of tendering witnesses should be generally followed. Their Lordships of the Judicial Committee doubted whether that rule of practice as expressed by the Court of Criminal Appeal sufficiently recognized that the prosecutor has a discretion and that the Court will not interfere with the exercise of that discretion unless perhaps it could be shown that the prosecutor had been influenced by some oblique motive. Lord Thankerton referred to the judgment of Baron Alderson in *Reg.* v. *Woodhead* (1), that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; that they should be in Court but that they were to be called by the party who wanted their evidence. Lord Thankerton also referred to *Reg.* v. *Cassidy* (2) where Baron Parke, after consultation with Cresswell J. stated the rule in similar terms. Lord Thankerton does go on to say that it is consistent with the discretion of counsel for the prosecutor, which is thus recognized, that it should be a general practice of prosecuting counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examinaion by the defence, but it remains a matter for the prosecutor's discretion. Reference was also made to an interlocutory remark by Lord Hewart in *Rex* v. *Harris* (3): "in criminal cases the prosecution is bound to call all the material witnesses before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury." Lord Thankerton said that in their Lordships' view, the Chief Justice could not have intended to negative the long-established right of the prosecutor to exercise his discretion to determine who the material witnesses are.

In the present case there did not appear on the back of the charge sheet the name of any witness but that fact is unimportant. Powell and Lowes did not give evidence at the preliminary inquiry. There was no obligation on the Crown to call either of them at the trial and we are there-

(1) (1847) 2 C. & K. 520. (2) (1858) 1 F. & F. 79.
(3) [1927] 2 K.B. 587 at 590.

fore not concerned with the question whether the explanation of Powell's absence was satisfactory or not. Of course, the Crown must not hold back evidence because it would assist an accused but there is no suggestion that this was done in the present case or, to use the words of Lord Thankerton, "that the prosecutor had been influenced by some oblique motive." It is idle to rely upon such expressions as this or the one used by Lord Roche without relating them to the matters under discussion but the important thing is that unless there are some particular circumstances of the nature envisaged, the prosecutor is free to exercise his discretion to determine who are the material witnesses.

The second ground of appeal may be disposed of in a few words. Subsection 4 of section 1013 of the *Code* enacts:

> (4) Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the court of appeal against any judgment or verdict of acquittal of a trial court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

It is not contended that Mr. Brown was not the agent of the Attorney General of British Columbia or that he did not have the latter's authority to institute the appeal to the British Columbia Court of Appeal but it is said that at least the Attorney General personally should have signed the notice of appeal. It is sufficient to say that it is not so expressed in the subsection, either explicitly or inferentially, and that there is no substance to the objection.

In registering a conviction, the Court of Appeal had the authority of this Court in *Belyea* v. *The King* (1). It was there pointed out that by section 1014 of the *Criminal Code*, the powers of a Court of Appeal on hearing an appeal by a person convicted are, under subsection 3, in the event of the appeal being allowed, to

(*a*) quash the conviction and direct a judgment and verdict of acquittal to be entered, or

(*b*) direct a new trial;

and in either case may make such other order as justice requires.

This section is made applicable on an appeal by the Attorney General against an acquittal by the provisions of subsection 5 of section 1013 as enacted by section 28 of chapter 11 of the Statutes of 1930, that *mutatis mutandis*

(1) [1932] S.C.R. 279 at 297.

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on the appeal thereby given, the Court shall have the same powers as it has on an appeal by the accused. Chief Justice Anglin pointed out that while it seemed rather a strong thing to hold that the effect of the words *mutatis mutandis* is that that clause must be made to read "on an appeal by the Attorney General to

(*a*) quash the *acquittal* and direct a judgment and verdict of *conviction* to be entered;"

yet that apparently was the construction put upon the provision by the Appellate Division of the Supreme Court of Ontario. Chief Justice Anglin continued by stating that while it had occurred to some members of this Court that the correct course would be to apply clause (*b*) and to direct a new trial, the Court was merely affirming the facts found by the trial judge and upon them reached the conclusion that the only course open to the Appellate Division was to allow the appeal and convict the accused.

Upon reading the reasons for judgment of His Honour Judge Sargent, I am convinced that not only did he not accept or believe the appellant's testimony but he believed and accepted the evidence of Bunyk and it was only because he considered himself bound by the previous decision of the Court of Appeal for British Columbia that he dismissed the charge.

The appeal should be dismissed.

RAND J.:—I think it clear from the authorities cited that no such absolute duty rests on the prosecution as the Court of Appeal in the earlier proceeding held. Material witnesses in this context are those who can testify to material facts, but obviously that is not identical with being "essential to the unfolding of the narrative." The duty of the prosecutor to see that no unfairness is done the accused is entirely compatible with discretion as to witnesses; the duty of the Court is to see that the balance between these is not improperly disturbed.

On the other two points also, I concur, and the appeal must be dismissed.

LOCKE J.:—The appellant, Paul Lemay, was in the month of September 1950 charged with having, at the City of Vancouver, sold a narcotic drug to one Stephen Bunyk, contrary to the provisions of the *Opium and Narcotic Drugs Act*, and on that charge, after a preliminary enquiry, was committed for trial by the Deputy Police Magistrate on October 6, 1950.

At the preliminary hearing, evidence for the Crown was given by Bunyk, an officer in the Royal Canadian Mounted Police, to the effect that he had on September 21, 1950, proceeded to a restaurant on Hastings Street in Vancouver, in company with one Powell, and entering the restaurant alone purchased the drug from Lemay in the presence of one Art Lowes.

Thereafter, having elected to take a speedy trial before His Honour Judge Bruce Boyd, a judge of the County Court at Vancouver, he was found guilty and sentenced to a term of imprisonment and a fine. Powell, an informer in the employ of the Mounted Police, who had not entered the restaurant with Bunyk, was not called by the Crown at the trial before the learned County Court Judge, though the fact that he had accompanied Bunyk to the restaurant was mentioned. I would infer from the reasons for judgment delivered upon this appeal that the name of Lowes was not mentioned at the trial and it is clear that he was not called as a witness. The present Appellant appealed to the Court of Appeal for British Columbia (1) and that court, by a decision of the majority (Sidney Smith J.A. dissenting), set the conviction aside upon the ground that as, apparently, Powell had seen the accused in the restaurant his evidence was material on the question of identification, and that there was an obligation on the prosecution to call him. Adopting an expression used by Lord Roche, in delivering the judgment of the Judicial Committee in *Rex* v. *Seneviratne* (2), that witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called by the prosecution, O'Halloran J.A., with whom Robertson J.A. agreed, said in part:

> If all material witnesses are not called by the prosecution, the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our courts have long recognized as essential to a fair trial.

(1) 100 Can. C.C. 367.

(2) [1936] 3 W.W.R. 360 at 378.

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Lemay appeared for trial again before His Honour Judge R. A. Sargent of the County Court of Vancouver on February 8, 1951, and was represented by counsel. Bunyk gave evidence that Powell had accompanied him to the restaurant and had not entered and, while not mentioning in his evidence in chief the presence of Lowes, did so in cross-examination, saying that Lowes was sitting in a booth in the restaurant with Lemay when he had purchased the drug. Describing the transaction he said that Lemay had in his hand a fingerstall containing capsules wrapped in silver paper when he (Bunyk) sat down opposite him in the booth and asked if he could get one, whereupon Lemay took one of the capsules and placed it on the table in front of him and he thereupon paid Lemay $3.00. Some evidence was given at the hearing of efforts made by the Crown to locate Powell and of their failure but, in the view that I take of this matter, it is unnecessary to consider its sufficiency since if the Crown was under a legal obligation to call Powell or account for his absence, clearly there was the same obligation in respect of Lowes who saw the whole transaction, and no effort was made to account for the failure to call him.

It is of importance to note that while the appellant had known from the date of the preliminary hearing before the Deputy Police Magistrate that Bunyk had, according to his story, been accompanied by Powell to the restaurant and had purchased the drug in the presence of Art Lowes, no request was made at the commencement of the trial before His Honour Judge Sargent or during the course of the trial for a direction that the Crown should either call them or assist the defence in locating them, or for an adjournment so that they could be located. The only evidence of identification was that of Constable Bunyk who, while a police officer, had been working under cover in Vancouver and who had during a period of weeks before the date of the purchase seen Lemay a number of times. Lemay's defence was simply a complete denial of the whole affair and he swore that he had never seen Bunyk before the latter appeared in the Police Court to give evidence. As to Lowes, he said that while he might know him he did

not know him by that name. On the question of credibility, the learned trial judge, in giving judgment, said in part:

> The accused went into the box and categorically denied any sale of narcotics and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony.

Then saying that he did not feel that there was sufficient evidence to make a finding as to whether Powell did or did not see the transaction, that the evidence had shown that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police and that no explanation had been given as to why he had not been called or what, if any, attempts had been made to find him, after quoting from the judgment of O'Halloran J.A. as to the obligation of the Crown to call all material witnesses, dismissed the charge against the prisoner.

The Attorney-General of the Province of British Columbia appealed to the Court of Appeal (1) under the provisions of subsection 4 of section 1013 of the *Criminal Code* and that Court, by a decision of the majority (O'Halloran J.A. dissenting) allowed the appeal, set the acquittal aside and directed that a conviction be entered and the case remitted to the trial judge for sentence.

The appellant alleges two errors in the judgment appealed from: the first, that the notice of appeal to the Court of Appeal which was signed by Douglas Mackay Brown, agent for the Attorney-General of British Columbia, was an insufficient compliance with section 1013(4) of the *Code*, and the second, in finding that it was not essential to the Crown to call Powell and Lowes as witnesses at the trial.

As to the first of these points there was no disagreement in the Court of Appeal and I respectfully agree with Mr. Justice Robertson that the signature by the agent of the Attorney-General was sufficient.

The contention of the appellant upon the second point is that, as stated by Mr. Justice O'Halloran, Lowes and Powell were material witnesses on the question of the identification of Lemay and there was an obligation in law upon the Crown to call them. For the Crown it is said that it is for the Crown prosecutor, as the representative

(1) 100 Can. C.C. 365.

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of His Majesty, to decide what evidence is to be called for the prosecution and that, subject to something in the nature of bad faith on his part, such as endeavouring to obtain a conviction by suppressing the truth (in which event the trial judge could properly intervene), his decision in the matter may not be interfered with. It is perhaps unnecessary to say that there is no suggestion of any such impropriety on the part of those representing the Crown at the preliminary hearing and the trial of this matter.

Since the *Criminal Code* is silent on the matter, the obligation contended for by the appellant, if it exists, must be part of the common law of British Columbia. The question, or one closely allied to it, has been considered in a number of decisions in England. In *R.* v. *Simmonds* (1), where counsel for the Crown declined to call a witness whose name appeared on the back of the Indictment, Hullock B. said that, though the prosecution were not bound to call every witness whose name was on the indictment, it was usual to do so and, if it was not done, he as the judge would call the witness so that the prisoner's counsel might have an opportunity to cross-examine him. In a note to this case there is a reference to *R.* v. *Witebread,* where on a trial for larceny the prosecution omitted to call an apprentice of the prosecutor who had been implicated in the theft and who had been examined at the police office and before the grand jury and whose name was on the back of the indictment. Counsel for the prisoner contended that the witness ought to be called but counsel for the prosecution declined, saying that the prisoner's counsel might himself call him if he chose. Holroyd and Burrough JJ. held that the prosecutor's counsel was not bound to call all the witnesses whose names were on the indictment merely to let the other side cross-examine them. The note further reports, however, that in the case of *R.* v. *John Taylor,* tried in the same year, Park J. called all the witnesses whose names appeared on the back of the indictment whom the prosecutor had not called, merely to allow the prisoner's counsel to cross-examine them. In *R.* v. *Beezley* (2), Littledale J. said that counsel for the prosecution who had closed his case without calling all of the witnesses whose names were on the indictment should call all of them, in

(1) (1823) 1 C. & P. 84.

(2) (1830) 4 C. & P. 220.

order to give the prisoner's counsel an opportunity of cross-examining them. In *R.* v. *Bodle* (1), where the charge was murder and counsel for the Crown declined to call the father of the prisoner whose name was on the back of the indictment, Gaselee J., having conferred with Mr. Baron Vaughan, said that they were both of the opinion that if counsel for the prosecution declined to call a witness whose name is on the back of the indictment it is in the discretion of the judge who tries the case to say whether the witness should be called for the prisoner's counsel to examine him, before the prisoner is called on for his defence. In *R.* v. *Holden* (2), the charge was murder. The Crown did not call the daughter of the deceased person who, apparently had been present when the offence was committed, whose name was not on the back of the indictment and who was in court. Patteson J. said that she should be called and that every witness who was present at a transaction of that kind, even if they give different accounts, should be heard by the jury so as to draw their own conclusion as to the real truth of the matter. There had been a postmortem examination of the body of the deceased in the presence of three surgeons but, of these, only two were called to give evidence for the Crown, though the third was in court. Patteson J. said that he was aware that the name of this person was not on the back of the indictment but that as he was in court he would insist on his being examined and said:

> He is a material witness who was not called on the part of the prosecution and as he is in court I shall call him for the furtherance of justice.

In *R.* v. *Bull* (3), counsel for the Crown said that there was one witness examined before the grand jury whom, on account of information he had since received, it was not his intention to call as a witness for the prosecution; on counsel for the prisoner objecting that it was unfair not to examine all those whose names were on the back of the bill and Crown counsel saying that his intention was to put the witness into the box, Vaughan J. said that the proper course was to put the witness into the box and that:

> every witness ought to be examined. In cases of this kind counsel ought not to keep back a witness because his evidence may weaken the case for the prosecution.

(1) (1883) 6 C. & P. 186. (2) (1838) 8 C. & P. 606.
(3) (1839) 9 C. & P. 22.

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In *R.* v. *Stroner* (1), Pollock C.B. directed the prosecution to call two persons as witnesses for the prosecution whose evidence he considered to be material and whose names were not on the back of the indictment but who were in court as witnesses for the accused. In *R.* v. *Barley* (2), where the prosecution did not call two witnesses whose names were on the back of the indictment, Pollock C.B. after consulting with Coleridge J. intimated that the witnesses ought to be called by counsel for the prosecution, whereupon the witnesses were placed in the box and sworn on the part of the Crown and cross-examined on behalf of the prisoner.

The practice in the matter appears to have been clarified in 1847 when in *R.* v. *Woodhead* (3), where counsel for the Crown, after stating the case for the prosecution, had observed that he did not deem it necessary to call all the witnesses whose names were on the back of the indictment, unless counsel for the prisoner should desire it, Alderson B. said:

> You are aware, I presume, of the rule which the judges have lately laid down, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment. The witnesses, however, should be here, because the prisoner might otherwise be misled; he might, from their names being on the bill, have relied on your bringing them here, and have neglected to bring them himself. You ought, therefore, to have them in court, but they are to be called by the party who wants their evidence. This is the only sensible rule.

Counsel for the prisoner then asked whether if he called these persons he would make them his own witnesses, to which Alderson B. replied:

> Yes, certainly. That is the proper course, and one which is consistent with other rules of practice. For instance, if they were called by the prosecutor, it might be contended that he ought not to give evidence to shew them unworthy of credit, however falsely the witnesses might have deposed.

In *R.* v. *Cassidy* (4), where the prosecutor refused to call a witness whose name was on the back of the indictment and counsel for the prisoner contended that "according to the usual practice" he ought in fairness to do so, Baron Parke said that while the usual course was for the prosecutor to call the witness and, if he declined to examine, the prisoner might cross-examine him, he thought the practice

(1) (1845) 1 C. & K. 650.
(2) (1847) 2 Cox 191.
(3) (1847) 2 C. & K. 520.
(4) (1858) 1 F. & F. 79.

did not stand upon any very clear or correct principle and was supported only on the authority of single judges on criminal trials, and he should, therefore, follow what he considered the correct principle, that the counsel for the prosecution should call what witnesses he thought proper, and that, by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have abstained from subpoenaing them. He then said that he would follow the course said to have been pursued by Campbell C.J. in a recent case, who ruled that the prosecutor was not bound to call such a witness and that, if the prisoner did so, the witness should be considered as his own. Upon counsel for the prisoner saying that he believed that Creswell J. had acted differently, Parke B. consulted with the latter and then said that Creswell J. had informed him that he had always allowed the prosecutor to take his own course in such circumstances, without compelling him to call the witness if he did not think fit to do so, and that he entirely agreed with what Baron Parke proposed to do.

The judgment of Baron Parke in *Cassidy's* case was delivered in March 1858. Section 11 of the *Criminal Code* declares that the criminal law of England as it existed on November 19, 1858, in so far as it has not been repealed by any ordinance or act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of the said colonies, or by this Act or any other Act of the Parliament of Canada, and as altered, varied, modified or affected by any such ordinance or Act, shall be the criminal law of the Province of British Columbia. Prior to the enactment of the *Code* the matter had been dealt with and the same date fixed by a proclamation issued under the public seal of the colony of British Columbia by Governor Douglas on November 19, 1858, and by an Ordinance to assimilate the general application of English Law (30 Vict. c. 70) adopted by the Legislative Council of British Columbia on March 6, 1867. In substantially the same form, the provisions of the Ordinance are continued in the *English Law Act*, c. 111, R.S.B.C. 1948, section 2. The matter we are considering has not been dealt with by statute. If, therefore, what appears to

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have been considered as a rule of practice prior to 1858 had become part of the common law of England, the principle was as stated by Baron Alderson in *R.* v. *Woodhead* and Baron Parke in *R.* v. *Cassidy*. That these decisions are to be regarded as correctly stating the law of England as it was in 1858 is settled by the decision of the Judicial Committee in *Adel Muhammed* v. *Attorney-General for Palestine* (1). Lord Thankerton, it will be noted, in delivering the judgment of the Judicial Committee, said in part:

> While their Lordships agree that there was no obligation on the prosecution to tender these witnesses, and, therefore, this contention of the present appellant fails, their Lordships doubt whether the rule of practice as expressed by the Court of Criminal Appeal sufficiently recognizes that the prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

While the case was an appeal from the Court of Criminal Appeal of Palestine and the conviction had been made under the Criminal Code Ordinance 1936 of that State, it is apparent that the matter had not been dealt with by statute and that the law of Palestine was in this respect the same as that of England.

In delivering the judgment in the appeal taken by Lemay to the Court of Appeal from his conviction, O'Halloran J.A. refers to two decisions of the courts of British Columbia in which the matter was considered. In *R.* v. *Sing* (2), where the Crown did not call certain witnesses whose names were on the back of the indictment, Macdonald J., referring to *R.* v. *Woodhead* and *R.* v. *Cassidy* and to a more recent decision in *R.* v. *Wiggins* (3), ruled that, unless the Crown saw fit to do so, it was not necessary to call all of the witnesses whose names appeared. Counsel for the prisoner contended that there were two other witnesses called at the preliminary who should be called, in order that he might cross-examine them, but the report of the matter does not indicate that any such order was made. In *R.* v. *Hop Lee* (4), where the charge was selling narcotic drugs, the Crown did not call a Chinese witness who was in the employ of the police and who had been a witness to the sale. The accused was convicted and appealed to the Court

(1) [1944] A.C. 156 at 168.
(2) (1932) 50 B.C.R. 32.
(3) (1867) 10 Cox 562.
(4) (1941) 56 B.C.R. 151.

of Appeal and the report shows that counsel for the Crown there took the attitude that the Crown was under no obligation to call all the witnesses and that this particular man was a "stool pigeon" whose evidence could not be relied upon. The Court unanimously dismissed the appeal and it may be noted that McDonald J.A. (afterwards C.J.B.C.) quoted a length from the judgment of Lord Roche in *Rex* v. *Seneviratne,* which has been so much discussed in the present matter, including that passage where it is said that their Lordships could not, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence.

In the present matter the prisoner, who was tried before His Honour Judge Sargent in February 1951, had known since the previous September that Bunyk would give evidence that he had been accompanied to the restaurant by Powell and that Lowes was sitting in the booth with him when the sale was made to the constable. The proceedings following the committal were, by reason of the election of the appellant, by way of speedy trial and there was thus no indictment upon which the names of the witnesses proposed to be called would be endorsed and there is no suggestion that any step was taken on the part of the prosecution which would lead counsel for the accused to expect that they would be in court when the matter came up for hearing and thus available to give evidence, as was the case in *R.* v. *Woodhead.* Powell was an informer in the employ of the police and, even had he been available, counsel for the Crown might well have decided not to call him as a witness for the prosecution, as was done in the case of Hop Lee. As to Lowes, the only information concerning him in the record is that Constable Bunyk on re-examination said that he (Lowes) had no connection with the matter "as far as the R.C.M.P. is concerned" and that he was not an operator for the R.C.M.P. From the fact that Lowes was, according to Bunyk, sitting at the table in the restaurant with Lemay when the latter produced the finger-stall containing the small packages of the drug and made the sale to Bunyk, it might be inferred that Lowes was a confederate of the latter, since, otherwise, he would be unlikely to commit a criminal offence in his presence. If

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this be the proper inference to draw, is it to be said that, as a matter of law, the Crown was required to call Lowes as a witness for the prosecution and thus, assuming he should join with Lemay in denying that any such transaction had taken place, assist a guilty person to escape? From a practical view point, if that was the law, far from furthering the due administration of justice it would, in my opinion, actively retard it. In the case of those engaged in the illicit drug traffic, by working in pairs, the one making the sale would be assured at all times of having a witness with him available, in the case of a prosecution, to join in denying that anything of the kind had taken place and whom the Crown would be bound to call. For the appellant, reliance is placed upon that portion of the judgment of Lord Roche, hereinbefore referred to, where it was said that the witnesses essential to the "unfolding of the narrative on which the prosecution is based" must be called. This language must, however, be read together with its context, as was done by McDonald J.A. in Hop Lee's case, and so read it does not, in my opinion, sustain the contention of the appellant. If, indeed, there were any difference between what was said by Lord Roche in that case, which, as the report indicates, was *obiter,* and what was said by Lord Thankerton in the case of *Adel Muhammed* (and I think there is not), it is, in my opinion, the latter view that should be accepted.

The reasons for judgment delivered by His Honour Judge Sargent satify me that he believed the evidence of the witness Bunyk and that, had he not considered that he was bound to acquit the accused by reason of the failure of the Crown to call Lowes as a witness or account for his absence, he would have found the accused guilty.

As to the contention that there was error in the judgment appealed from, in that the appellant was found guilty and the case remitted to the trial judge for sentence, the matter appears to me to be determined against the appellant by the decision of this court in *Rex* v. *Belyea* (1).

I would dismiss this appeal.

(1) [1932] S.C.R. 279.

CARTWRIGHT J. (dissenting in part):—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) dated March 22, 1951, setting aside the judgment of acquittal of a charge of unlawfully selling a drug contrary to the provisions of the *Opium and Narcotic Drug Act* pronounced on the 27th February, 1951, by His Honour Judge Sargent, ordering a conviction to be entered and remitting the case to the trial judge to impose sentence.

The respondent was first tried for the said offence before His Honour Judge Boyd and was convicted on November 2, 1950. On December 22, 1950, this conviction was set aside by the Court of Appeal for British Columbia (2) (O'Halloran, Robertson and Sidney Smith, JJ.A.) the last named learned Justice of Appeal dissenting, and a new trial was directed.

The evidence mainly relied on by the Crown at the trial with which we are concerned, before His Honour Judge Sargent, was that of Constable Bunyk of the Royal Canadian Mounted Police who testified in chief that on the 21st of September, 1950, at about 9.15 a.m. accompanied by one Powell he approached the Malina Café in Vancouver; that he looked through the window and saw the appellant, who was already known to him, seated at a table in about the fifth booth on the west side of the café; that he can not tell whether Powell also looked through the window or saw the appellant; that he (Bunyk) entered the café alone and sat down beside the appellant; that the appellant had in his hand a grey finger-stall containing several capsules wrapped in silver paper and was trying to remove an elastic band from around the top of the finger-stall; that he said to the appellant—"Can I get one?" and the appellant replied "Yes"; that the appellant took one of the capsules from the finger-stall and placed it on the table in front of Bunyk; that he (Bunyk) picked it up and put it in his pocket and handed the appellant three dollars; that he left the café and rejoined Powell about two doors east of the café. In cross-examination and re-examination Bunyk testified that throughout the transaction which he had described in chief one Art Lowes was sitting in the booth with the appellant and that Lowes was

(1) 100 Can. C.C. 365. (2) 100 Can. C.C. 367.

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known to him (Bunyk). The following questions and answers are found in the re-examination:

Q. How did Lowes happen to be with LeMay at the time of this transaction?

A. I have no idea.

Q. Did the Art Lowes who was with LeMay at the time of the transaction have any connection with this case as far as the R.C.M.P. is concerned?

A. None whatever.

Q. Is Lowes an operator for the R.C.M.P.?

A. No, he is not.

The Crown proved that the capsule purchased by Bunyk contained the drug mentioned in the charge.

The appellant gave evidence. He denied having had anything to do with the matter; stated that he had never seen Bunyk prior to the preliminary hearing; that he did not use drugs and that he had never sold a drug to Bunyk or to anyone else. The learned trial judge reserved judgment and later dismissed the charge.

In examining the reasons for judgment of the learned trial judge it is necessary to know something of the earlier trial of the appellant and of the reasons which moved the Court of Appeal to set aside that conviction and direct a new trial.

The only substantial differences between the evidence given at the first trial and that given at the second which were suggested to be relevant to the determination of this appeal appear to be: (i) At the first trial the evidence in the view of the Court of Appeal indicated that Powell was in a position to see what occurred in the café at the time Bunyk purchased the drug, while the effect of the evidence in this regard at the second trial is summarized by the learned trial judge as follows:

I do not feel that there is sufficient evidence before me upon which to make any finding, either that Powell did or did not see the transaction between the accused and Bunyk.

(ii) At the first trial no evidence was given to shew why counsel for the Crown did not call Powell as a witness, while at the second trial evidence was received to the effect that he had disappeared and that inquiries as to his whereabouts were unproductive of result. (It should be mentioned that Mr. Hall argued that the evidence as to the making of these inquiries was inadmissible on the ground

that it was hearsay, but as, in my view, this evidence has no bearing on the result of the appeal I do not deal with this question.) (iii) At the first trial there was no evidence of the presence of Art Lowes at the time of the sale, indeed, Lowes was not mentioned at all.

The reasons for judgment of the Court of Appeal on the appeal from the conviction at the first trial are set out in full in the reasons of O'Halloran J.A. in the present case and are reported as LeMay (No. 1) in 100 C.C.C. pages 367 and 368. The question whether that judgment was right in the result is not before us and I express no opinion. That appeal was brought by the accused and under section 1014(*c*) of the *Criminal Code* it was the duty of the Court of Appeal to allow the appeal if of opinion that on any ground there was a miscarriage of justice.

The learned judge presiding at the second trial appears to me to have interpreted the reasons of the Court of Appeal in LeMay (No. 1) as laying down as a rule of law that the unexplained omission on the part of the Crown to call a witness shewn by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal. The learned trial judge appears to have inclined to the view that the failure to call Powell was sufficiently explained. He then proceeds:

> However, there is one other piece of evidence which came out in cross-examination, namely, that a third person, Lowes was present at the sale to Bunyk. Evidence was led by the Crown to show that Lowes was not connected with Bunyk or the Royal Canadian Mounted Police, but no explanation was given as to why he had not been called, or what, if any, attempts were made to find him.
>
> On these facts I am faced with the principle laid down by the Court of Appeal in *Rex* v. *Lemay*. In that case, Mr. Justice O'Halloran said in the course of his judgment:
>
> > If all material witnesses are not called by the prosecution, the defence is thereby deprived of the opportunity for cross-examination, and to that extent an accused is denied the right of full defence which our Courts have long recognized as essential to a fair trial.
>
> The judgment is binding on me in this case. Therefore, the motion to dismiss will be allowed and the charge dismissed.

The right of appeal against a judgment of acquittal is given to the Attorney-General by section 1013(4) and is, of course, restricted to grounds of appeal which involve a question of law alone.

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In my respectful opinion the learned trial judge erred in law in instructing himself that there is a rule of law such as he deduced from the judgment of the Court of Appeal in LeMay (No. 1) viz: that the unexplained omission on the part of the Crown to call a witness shewn by the evidence to have been in a position to give relevant and material evidence as to the guilt or innocence of the accused necessitates an acquittal.

I do not propose to examine the authorities at length. I think it sufficient to refer to the judgment of their Lordships of the Judicial Committee delivered by Lord Thankerton in *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (1) and particularly at pages 167 to 169, where it is laid down that the Court will not interfere with the exercise of the discretion of the prosecutor as to what witnesses should be called for the prosecution unless, perhaps, it can be shewn that the prosecutor has been influenced by some oblique motive. I find no conflict between this judgment and that pronounced by Lord Roche, also speaking for the Judicial Committee in *Rex* v. *Seneviratne* (2). Counsel for the appellant laid emphasis on the following passage at page 378:

> Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

It must be remembered that *Rex* v. *Seneviratne* was a case in which the accused had been convicted of murder on purely circumstantial evidence. In the passage just quoted it appears to me that Lord Roche was referring to the duty which clearly rests upon the prosecutor to place before the Court evidence of every material circumstance known to the prosecution including, of course, those circumstances which are favourable to the accused. It must also be remembered that Lord Roche was not dealing with an argument of counsel for the accused that the prosecutor had failed to call witnesses that he should have called, but with the reply of counsel for the Crown to the argument of counsel for the defence that the prosecutor had called a number of witnesses who gave irrelevant and inadmissible evidence and whose evidence ought not to have been received.

(1) [1944] A.C. 156. (2) [1936] 3 W.W.R. 360.

I wish to make it perfectly clear that I do not intend to say anything which might be regarded as lessening the duty which rests upon counsel for the Crown to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise; nor do I intend to suggest that there may not be cases in which the failure of the prosecutor to call a witness will cause the tribunal of fact to come to the conclusion that it would be unsafe to convict. The principle stated by Avory J. in *Rex* v. *Harris* (1), that in a criminal trial where the liberty of a subject is at stake, the sole object of the proceedings is to make certain that justice should be done between the subject and the State, is firmly established.

While it is the right of the prosecutor to exercise his discretion to determine who the material witnesses are, the failure on his part to place the whole of the story as known to the prosecution before the tribunal of fact may well be ground for quashing a conviction. Such a case is that of *Edward Guerin* (2).

For the above reasons I am of opinion that the learned trial judge erred in directing himself that he was bound as a matter of law to acquit the appellant because of the fact that the Crown did not call Art Lowes as a witness; and that the Court of Appeal were right in deciding that the judgment of acquittal should be set aside.

As to the second ground of appeal argued before us—that the notice of appeal to the Court of Appeal was not in accordance with section 1013(4) of the *Criminal Code*—I agree with what has been said by my brother Kerwin.

It remains to consider Mr. Hall's final argument that the Court of Appeal erred in directing a conviction to be entered and that if the setting aside of the acquittal is upheld a new trial should be directed.

We are bound by the judgment of this Court in *Rex* v. *Belyea* (3), which decided that the wording of section 1013(5) of the *Criminal Code* is apt to confer jurisdiction on the Court of Appeal in an appeal brought by the Attorney-Generel under section 1013(4) not only to set aside the judgment of acquittal and to direct a new trial but, in a proper case, to direct a conviction to be entered, and

(1) [1927] 2 K.B. 587 at 594. (2) (1931) 23 C.A.R. 39.
(3) [1932] S.C.R. 279.

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it is irrelevant to inquire whether, if the matter were *res integra* I would have found the wording of the section sufficiently plain and unambiguous to effect so revolutionary a change in the pre-existing law.

In my opinion the power to direct that a conviction be entered after an acquittal by a trial judge has been set aside can be exercised only if it appears to the Court of Appeal from the judgment of the trial judge that he must have been satisfied of facts which proved the accused guilty of the offence charged. In the case at bar I do not think that this appears. It is quite true that the learned trial judge says:

> The accused went into the box and categorically denied any sale of narcotics, and the testimony of Bunyk *in toto*. He further states that he did not know Lowes, at least by name. These denials I do not accept, nor do I believe his testimony.

but he nowhere states expressly, nor does it follow by irresistible inference from anything he does say, that he accepts the evidence of Bunyk. He does not say that, but for the supposed rule of law which he applied, he would have found the accused guilty. He does not indicate that he is left without any reasonable doubt as to his guilt. In the view he took of the law, it was, indeed, no more necessary for the learned trial judge to express himself upon any of these vital matters than it would have been for a jury to do so after being directed that in view of a point of law taken by the defence they must return a verdict of "not guilty". It is not, I think, sufficient that, from the reasons of the learned trial judge, it should appear to the Court of Appeal in the highest degree probable that he would have convicted but for his erroneous ruling on the point of law; it must appear certain that he would have done so.

I would allow the appeal to the extent of setting aside that part of the order of the Court of Appeal which directs a conviction to be entered and would order a new trial.

Appeal dismissed.

Solicitor for the appellant: *H. T. Fitzsimmons.*

Solicitor for the respondent: *Hon. Gordon S. Wismer.*

NICK AGOSTINO .....APPELLANT; 1951

AND *Nov. 29, 30. *Dec. 17.

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Criminal law—Evidence—Sale of drugs—Denial by accused—Proof of identification—Duty of Crown as to calling of witnesses—Whether notice of appeal must be signed by the Attorney General—Power of Court of Appeal to enter conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49—Criminal Code, ss. 1013(4), 1014, 1023(2).

The facts in this case were similar to that of *Lemay* v. *The King*, reported in this volume at page 232, with the exception that the sale was made by Agostino to Bunyk on the street and that Powell, but not Lowes, was present on that occasion. The members of the Court were the same, and for the reasons respectively given by them in the *Lemay* case, dismissed the appeal (Cartwright J., dissenting in part, would have ordered a new trial).

J. Stevenson Hall for the appellant.

Douglas McKay Brown for the respondent.

Solicitor for the appellant: *H. T. Fitzsimmons.*

Solicitor for the respondent: *Hon. Gordon S. Wismer.*

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*May 28, 29
*Oct. 10

ADELAIDE CHRISTINE STANLEY and MARGUERITE VALENTINE MACLEOD ..... APPELLANTS;

AND

WALTER DOUGLAS, Executor of the last Will and Codicil of William F. Jardine, deceased ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

Will—Admitted to probate in solemn form—Power of Supreme Court of P.E.I. in Banco to order new trial—The Probate Act, 1939, c. 41 and amendments, ss. 37, 42, 43—The Judicature Act, 1940, c. 35 and amendments, s. 26(1), O. 58 rules 1, 4 and 5.

The Supreme Court of Prince Edward Island sitting *in banco*, set aside the judgment of Palmer J. of the Court of Probate whereby he admitted to probate in solemn form the will and codicil of the late William Faulkner Jardine, and ordered a new trial before the Probate Court. An appeal was taken from that part of the judgment directing a new trial. As to that part which set aside the judgment of the Probate Court, the appellant contended that the Appeal Court having found the documents submitted not proved, and no other document of a testamentary nature having been offered for probate, this was a finding of intestacy and the Appeal Court had no power to direct a new trial and further, since the evidence clearly established testamentary incapacity, a direction for a new trial was unnecessary.

Held: By the majority of the Court, Rand J. expressing no opinion and Cartwright J. accepting the reasons of Kerwin J. (concurred in by Taschereau J.) and of Kellock J., the Supreme Court *in banco* had power to direct a new trial.

Held: also, Rand and Cartwright JJ. dissenting, that in the circumstances of the case, a new trial should be had.

Rand J. would have allowed the appeal and pronounced against both the will and codicil. Cartwright J. would have dismissed the appeal, allowed the cross-appeal and restored the judgment of the trial judge.

Per Kerwin and Taschereau JJ.—Section 43 of *The Probate Act* stating that if the appeal is allowed the Court of Appeal shall make such order as shall seem fit is sufficient for that purpose. If there be any doubt then

Per Kerwin, Taschereau and Kellock JJ.—Such authority is to be found in *The Judicature Act*, 1940, c. 35, s. 26(1); 0.58 r. 5 passed thereunder, and 1941, c. 16, s. 2.

Per Kerwin and Taschereau JJ.—Without deciding whether such evidence would be admissible or not, on the new trial to be had, no one appearing as counsel for any party should give evidence.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Cartwright JJ.

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Per Cartwright J.:—While the earlier English and Canadian cases decided that the fact of counsel acting as a witness on behalf of his client was in itself a ground for ordering a new trial, such evidence is now legally admissible in Canada, but agreement is expressed with he statement of Ritchie C.J. in *Bank of British North America* v. *McElroy,* 15 N.B.R. 462 at 463 that the tendering of such evidence "is an indecent proceeding and should be discouraged".

APPEAL from the judgment of the Supreme Court of Prince Edward Island in Banco (1) setting aside the Judge of Probate's judgment admitting to probate in solemn form the last will and codicil of the late William Faulkner Jardine, and ordering a new trial in proof of the said documents per testes or in solemn form to be held before the Probate Court.

K. M. Martin, K.C., for the appellants. This appeal is taken from that part of the judgment of the Supreme Court of Prince Edward Island *en banc* which directs a new trial and not from that part of the judgment which sets aside the judgment of the Probate Court. The appellants contend as to the latter that the Court found that the documents which the Probate Court declared were proved before it as the last will and codicil of a competent testator had not been so proved, and as no other document of a testamentary nature was offered for probate the judgment is a finding that the decedent died intestate and therefore no new trial could be directed. Under the law of Prince Edward Island and under the rules and practice relating to appeals to the Supreme Court thereof from a judgment or decree of the Probate Court allowing an instrument of a testamentary nature alleged to have been executed by a decedent, the Supreme Court after setting aside the Probate Court's judgment has no power to direct a new trial before the latter with respect to the same matter or question which the Probate Court had already decided; and (subject to any appeal that might be taken from the Supreme Court's judgment setting aside that of the Probate Court) the Supreme Court's judgment setting aside the Probate Court's judgment allowing the documents, is final. The evidence before the Court clearly established incompetence and testamentary incapacity and a direction for a new trial of proof in solemn form was unnecessary. The

(1) (1950) 25 M.P.R. 222.

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respondent's application in the Probate Court and the proceedings taken to prove in solemn form or per testes were proceedings *in rem* and not *inter partes*. After pronouncement of the Probate Court in such proceedings there is not and never has been any provision in the practice of the Probate Court of P.E.I. for a new trial of the matters dealt with in such application.

The judge of Probate having issued a citation to all persons interested to show cause, having heard the evidence and found for the alleged will, his judgment thereupon became *res judicata* and final and conclusive with respect to the said application, except the right of appeal therefrom, and no further or other trial of the issues upon which the judgment was pronounced could afterward be directed either by the Probate Court itself or by the Court of Appeal. The Probate Court of P.E.I. has been the only court in which wills have been proved and filed since the Island was made a separate colony in 1769. It was and is entirely independent of the Supreme Court with a practice and procedure all its own. By c. 21 of the Acts of 1873 the Supreme Court of the Province became the Court of Appeal from the Probate Court and the practice and procedure in such appeal was therein set out. In 1939 the acts relating to the Surrogate and Probate Court were repealed by the present Act, c. 41, which Act with its amendments, and which Act alone regulates and governs appeals from the Probate Court to the Supreme Court.

The Act regulating the Supreme Court practice is *The Judicature Act*, 4 Geo. VI c. 35, 1940, and amendments thereto and the Rules of Court made thereunder. Neither the Act nor the rules enacted under its provisions purport to affect the practice with respect to appeals from the Probate Court, nor with the power of the Supreme Court on such appeals; all of which are matters dealt with and regulated by *The Probate Act* alone. Neither does *The Probate Act* adopt any of the provisions of *The Judicature Act* other than that by s. 37 it adopts the Supreme Court practice with regard to the manner of giving Notice of Motion when an appeal is taken. No where is the right given to the Court of Appeal to direct a new trial, except where that Court has directed an issue for the trial of a question arising upon the appeal. No such question arises

here. No issue was directed. No claim can therefore be made that the power of granting new trials given by s. 42 of *The Probate Act* was or could be exercised here. The questions arising under this appeal are the questions which were the issues which the Probate Judge decided and which upon such appeal the Supreme Court was called upon to decide and cannot for that reason be referred to some other court for decision. The power which the Supreme Court purported to exercise in making an order directing a new trial was a power which neither *The Probate Act* nor any other Act had given the Supreme Court, nor did it have any inherent power, it therefore acted without jurisdiction.

The right of appeal to the Supreme Court from the Probate Court, first granted in 1873 was a statutory right, and the powers given the Supreme Court re such appeals were statutory, to be found only in the Act regulating the practice and procedure of the Probate Court. Such a proceeding as a new trial by the Probate Court in a proceeding taken in that Court to prove a will in solemn form was unknown and although appeals have been taken from the Probate Court decisions many times, not once has a new trial been previously ordered.

The respondent's application in the Probate Court and the proceedings taken to prove in solemn form documents alleged to be the last will and codicil were proceedings *in rem,* not *inter partes*: after pronouncement of the Probate Court in such proceedings, there is not, and never has been any provision in the practice of the Probate Court for a new trial of the matters dealt with.

The difference between an action *in rem* and an action *in personam* or *inter partes* is material and has been emphasized in admiralty actions. *The Cella* (1888) P.D. 82 at 87; *The Longford* (1889) 14 P.D. 34 at 37; *The Burns* [1907] P. 137 at 149.

The authorities show that proceedings which are, or are equivalent to, proceedings *in rem,* as in this case, are regulated by rules of procedure differing materially from those of the Common Law courts with respect to actions *inter partes,* and that the Court appealed from erred when it directed such latter procedure to apply to the Probate Court in its direction for a new trial. In England it is neither the practice of the Admiralty Court nor the Court of

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Chancery to allow a new trial. *The Constitution* (1864) 2 Moo P.C. N.S. 453 at 461; *Dollman* v. *Jones* (1879) 12 C.D. 553 at 555.

The Court of Chancery had power to direct issues, as under s. 42 of the P.E.I. Probate Act the Court of Appeal might have done, but the Court directed no issue. The order made was that the judge of the Probate Court should try over again issues he had already decided, a direction not in accordance with the practice and beyond the powers of the Supreme Court.

Besides the objections taken to the direction for a new trial on the ground of lack of jurisdiction and upon the ground that the order made directed a mode of procedure unknown to the Probate Court in the proving of wills, the Appellants say that the Supreme Court had before it uncontradicted evidence of an incontrovertible nature which proved conclusively the testator's lack of testamentary capacity; that it was the duty of the Court to evaluate and pass upon such evidence and the law applicable thereto, and that the evidence was such, had it been given effect to, as would have resulted in the will and codicil being disallowed. It was incumbent upon the respondent when the evidence in the Probate Court showed the testamentary capacity was open to grave question, to adduce evidence to show the testator knew and understood the extent of the property of which he was disposing and the claims to which he ought to give effect. The respondent failed to do so. There was a still graver defect, not touched upon at all, except by way of inference by the Court of Appeal and that was evidence of the deceased's incapacity by reason of his lacking the moral sense, the sense of moral obligation and of moral responsibility, the lack of which disqualified the testator and rendered him incapable of making a will. *Banks* v. *Goodfellow* (1870) L. R. 5 Q.B. 549 at 563 per Cockburn C.J. at 563.

Cartwright J. "This might apply to the codicil but how would it apply to the will where he makes provision for the granddaughter?"

There were circumstances of suspicion inviting inquiry as both Courts below admit. It was the duty of the proponent of the will and codicil to adduce evidence to remove such suspicion. *Leger* v. *Poirier* [1944] S.C.R. 152; *Fulton* v.

Andrew L.R. 7 H.L. 448; *Tyrell* v. *Painton* [1894] P. 151. This finding of suspicious circumstances by the Court of Appeal, should have been the finding of the trial judge whose judgment it set aside. The appellants submit that the respondent having failed to discharge the *onus probandi*, this Court should declare the documents referred to not well proven and that the deceased died intestate.

J. A. Bentley K.C. and *Malcolm McKinnon K.C.* for the respondent. The judgment of the Appeal Court cannot be divided into separate parts and that part, which directs that the pronouncement for the Will and Codicil be set aside, cannot be regarded as a judgment in itself without the order for a new trial. The Appeal Court did not set aside the will and codicil but left them for further proof *per testes* and in solemn form before the Judge of Probate by a new trial and that was the only finding it made. *The Judicature Act* and the Rules of Court made thereunder govern all appeals to the Appeal Court including appeals from the Probate Court, and the Appeal Court acted within its jurisdiction in the present case.

The Judicature Act, 1929, and rules of Court made in pursuance thereof, were consolidated and revised in 1940 by c. 35 and came into force on Jan. 2, and Feb. 3, 1941 respectively. Section 37 of *The Probate Act* (1939) allows appeals from the Probate Court regulated by *The Judicature Act*, 1929 and Rules of the Supreme Court. These rules, including the rule to grant a new trial (0.58 r. 5), were confirmed in 1941 after the passing of *The Probate Act* (1939) and sub-sec. (*f*) added to sub-sec. 1 of s. 26 of *The Judicature Act* expressly made the Supreme Court Rules apply to appeals from the Probate Court. Whether or not no new trial has ever before been directed in such a case as the present one, the Appeal Court has had the power to so direct since 1939 and acted under s. 37 of *The Probate Act* and in the manner prescribed by 0.58 r. 5 of *The Judicature Act* relating to appeals. The Respondent asks that the appellants' appeal be dismissed with costs of this Court and of the Court of Appeal below.

On the cross-appeal the respondent objected to the Court of Appeal ordering a new trial and submitted that the respondent having proved the capacity of the testator and the due execution of the will and codicil to the satisfaction

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of the judge of Probate was under no further onus, and that the learned Chief Justice had misconstrued the trial judge's pronouncement as to the preponderance of evidence of capacity. The learned Chief Justice had quoted Viscount Dunedin in *Robins* v. *National Trust* [1927] A.C. 519, but respondent submitted there was no even balance in the instant case and the Probate judge had held the onus was fully met by the propounders of the will so that the ruling of Viscount Dunedin at 520 was squarely in favour of no interference with the pronouncement of the trial judge. *Colonial Securities Trust Ltd.* v. *Massey* [1896] 1 Q.B. 38 Re Uz King (1931) 3 M.P.R. 367 at 371. The appellants failed to meet the onus resting on them of proving undue influence. *Badenach* v. *Inglis* 29 O.L.R. 168 per Riddle J. at 192; *Craig* v. *Lamoureux,* 50 D.L.R. 10 at 14; *Riach* v. *Ferris* [1934] S.C.R. 725; [1935] 1 D.L.R. 118.

The respondent did not dispute the authority of the Court to order a new trial but submitted that there was no evidence of incapacity sufficient to warrant such an order. *Faulkner* v. *Faulkner* 60 S.C.R. 386, followed in *Manges* v. *Mills* 64 D.L.R. 1; *Re McGuire* [1935] 3 D.L.R. 734.

The judgment of Kerwin and Taschereau, JJ. was delivered by:

KERWIN J.:—This is an appeal against a judgment of the Supreme Court of Prince Edward Island *in banco* (1) setting aside the judgment or pronouncement of the Judge of Probate which had declared that two certain documents were the last will and codicil thereto, respectively, of a competent testator, the late William F. Jardine, and ordering a new trial in proof of the said documents *per testes* or in solemn form be held before the Probate Court. The appellants are two of the heiresses at law and next of kin of the deceased, and the respondent is the executor of the said will and codicil.

William F. Jardine died January 2, 1949, and on January 5 of that year the appellants filed a caveat in the Probate Court requiring proof of the will to be made before the Court *per testes* or in solemn form of law. On the same day the respondent filed a petition in pursuance of which a citation was issued citing all the heirs and next of kin

(1) 25 M.P.R. 222.

of the deceased and all persons interested in the estate to appear before the judge of the Probate Court on February 17, 1949, to show cause, if any they could, why the said will and codicil should not be proved *testes* and in solemn form and why probate should not be granted. The trial took place at a subsequent date when the only appearances were on behalf of the executor and the present appellants. This procedure was adopted under s. 50 of *The Probate Act,* c. 41 of the Prince Edward Island Statutes of 1939, and s. 50*a*, added thereto by c. 15 of the Statutes of 1942. Since there was no allegation of undue influence or fraud, under Probate Rule 10 the respondent as the propounder of the will proceeded and was in the position of a plaintiff in a civil action and the caveator was in the position of a defendant.

It was in pursuance of s. 37 of *The Probate Act* that the respondent appealed "to the Court of Appeal by Notice of Motion in the manner prescribed by *The Judicature Act,* 1929, and Rules of the Supreme Court". By s. 2(*c*) the "Court of Appeal" means the Supreme Court sitting *in banco*. S. 43 provides in part as follows:

> 43. If the appeal is allowed, the Court of Appeal shall make such order, touching the same, and the costs thereto, as, under the circumstances of the case, shall seem fit; . . .

The appellants contend that the Supreme Court *in banco* could dismiss the appeal, or could allow the appeal and declare that it had not been proved that the documents were the last will and codicil of a competent testator, but that it could not order a new trial. For the respondent it is argued that s. 43 of *The Probate Act* quoted above, either by itself or when taken in conjunction with certain provisions of *The Judicature Act* and the rules passed thereunder clearly establish such right. In my view both of the respondent's contentions are correct. S. 43 of *The Probate Act* in stating that if the appeal is allowed the Court of Appeal shall make such order as shall seem fit is sufficient for that purpose. If there should be any doubt on that score, then the power is conferred under *The Judicature Act* and Rules.

The present *Judicature Act* is c. 35 of the 1940 Statutes, which with the exception of s. 11, was proclaimed as coming into force on January 2, 1941. The Rules of Court made in pursuance of s. 26 of that Act came into force on February 3, 1941. By s. 3 of *The Judicature Act,* the Supreme

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Court of Judicature of Prince Edward Island as constituted before the Act a Court * * * possessing original and appellate jurisdiction is to continue. By s. 10, the jurisdiction of the Court includes the jurisdiction which immediately preceding the coming in force of the Act was vested in, or capable of being exercised by all or any one or more of the judges of the Supreme Court of Prince Edward Island. By s. 29:

> 29. In all cases of appeal to the Court from the decision, judgment, order or decree of any Court or tribunal in the Province over which the Court has appellate jurisdiction, the appellant may proceed by notice of motion pursuant to the provisions of "The Rules of the Supreme Court" respecting appeals; * * *

By s. 2 of c. 16 of the Statutes of 1941, it was provided:

> 2. The Rules of Court made and published under Section 26 of the Judicature Act are hereby confirmed, and, insofar as any of the said Rules of Court purport to deal with substantive law, the same are hereby ratified and confirmed and declared to be within the jurisdiction of the Judges and Lieutenant-Governor-in-Council, as mentioned in said Section 26 of the Judicature Act.

By virtue of this section, even if the rules had not been confined to what was authorized under s. 26 of the Act as amended in 1941 and had dealt with substantive law, such rules were ratified and confirmed. Under rule 1 of order 58, all appeals to the Supreme Court shall be by way of rehearing and under rule 4 the Court has power *inter alia* to make such further or other order as the case requires. Rule 5 provides:

> 5. If upon the hearing of an appeal it shall appear to the Court that a new trial ought to be had, it shall be lawful for the said Court, if it thinks fit, to order that the verdict and Judgment be set aside and a new trial shall be had.

While on an appeal, strictly so called such a judgment can only be given as ought to have been given at the original hearing per Jessel M.R. in *Quilter* v. *Mapleson* (1), wider and more extensive powers are conferred when an appeal is by way of rehearing. Under rule 1 of order 58 appeals to the Supreme Court are by way of rehearing. When one adds to this the power conferred by rule 5 of order 58, it appears to me that the Supreme Court *in banco* had the jurisdiction and power to order a new trial in the present case as an appeal from the Probate Court is included in the expression "all appeals" in rule 1 of order 58.

(1) (1882) 9 Q.B.D. 672 at 676.

The appellants attempted to draw an analogy with proceedings in the Court of Chancery and referred to the statement of Lord Justice James in *Dollman* v. *Jones* (1). "In the Court of Chancery there was no such thing as a motion for a new trial * * * I should be sorry to establish a rule which would make every case in the Chancery Division subject to a motion for a new trial." This was said at a time when rule 1 of Order 34 of the English Rules referred to actions in the Queen's Bench, Common Pleas or Exchequer Divisions. This is quite apparent from the decision in *Krehl* v. *Burrell* (2), upon which the subsequent decision in *Dollman* v. *Jones* was based. The rules in England have been amended several times since then and in reading the older cases the distinction must be borne in mind between appeals and motions for a new trial, which latter were to be made to a Divisional Court.

Similarly the decisions under the Admiralty practice must be read in the light of the jurisdiction and procedure provided for at the time. The decision of the Privy Council in *"The Constitution"* (3), was given before *The Judicature Act* was enacted. In *"The Fred"* (4), Sir Francis Jeune was apparently of the view that the High Court had power to grant a new trial if it appeared that the parties never had a clear decision of the trial judge.

We were told that no record could be found of any case in the Island where a new trial had been ordered on an appeal from the decision of the Probate Court allowing, or rejecting an alleged testamentary document but in *Riding* v. *Hawkins* (5), the Court of Appeal granted a new trial on the ground of surprise at the trial of a probate suit to establish a will and codicil.

Circumstances must arise from time to time as in my opinion they did in this case, where the proper disposition of an appeal is to order a new trial. Since in my view this appeal should be dismissed, I do not propose to go over the evidence or what occurred at the trial. I am content to agree with the Chief Justice of the Island that for the reasons given by him a new trial should be had. I would add only that, without deciding whether such evidence

(1) (1879) 12 Ch. D. 553.
(2) 10 Ch. D. 420.
(3) (1864) 2 Moo. P.C. N.S. 453.
(4) (1895) 7 Asp. M.C. 550.
(5) (1889) 14 P.D. 56.

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would be admissible or not, on such new trial no one appearing as counsel for any party should give evidence. The appeal and the cross-appeal should be dismissed but under the circumstances without costs.

RAND J. (dissenting):—In the presence of uncontradicted evidence which, in my opinion, raised a grave suspicion of the competency of the testator, there rested upon the proponents the onus of satisfying the conscience of the Court that the documents were those of a man capable of appreciating the nature and extent of his property, not in piecemeal as in a dissociated mind but substantially in its entirety and of appreciating in the same manner those nearest him whose claims to his bounty, as it is described, are normally influential upon men. This I think they did not do and I would allow the appeal and pronounce against both the will and codicil. As the matter is to go to a new trial, however, I refrain from any examination of the facts.

KELLOCK J.:—The first and main contention of the appellants is that the court below, in directing a new trial, was without jurisdiction so to do, and that that part of the order, from which alone appeal is taken, must be deleted, with the effect of declaring that the testator died intestate.

It is not necessary to consider whether there is to be found within the four corners of *The Probate Act* itself any provision conferring such power upon the Supreme Court. S. 26(1) of *The Judicature Act*, c. 35 of the Statutes of 1940, authorizes the making of rules not inconsistent with the Act,

> (*b*) For regulating the pleading, practice and procedure in the Court;
> (*c*) Generally for regulating the conduct of the business coming within the cognizance of the Court for which provision is not expressly made by this Act.

Subsequently, and effective from February 3, 1941, Order 58, Rule 5 was passed. This reads as follows:

> If upon the hearing of an appeal it shall appear to the court that a new trial ought to be had, it shall be lawful for the said court, if it thinks fit, to order that the verdict and judgment be set aside and that a new trial shall be had.

In 1941, by 5 Geo. VI c. 16, assented to on April 10th of that year, it was enacted by s. 2 that

> The Rules of Court made and published under s. 26 of the Judicature Act are hereby confirmed, and, insofar as any of the said Rules of Court purport to deal with substantive law, the same are hereby ratified and

confirmed and declared to be within the jurisdiction of the Judges and Lieutenant-Governor-in-Council as mentioned in said s. 26 of the Judicature Act.

It is therefore no objection that the rule, when passed, may not have been within the power conferred by either paragraph (*b*) or (*c*) of s. 26(1) of the Act of 1940. Accordingly, in my opinion, the court below had authority to direct a new trial. I think, however, that the trial was so unsatisfactory as to render the direction with respect to a new trial the proper direction. The appeal and cross-appeal should, therefore, be dismissed with costs.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Supreme Court of Prince Edward Island *en banc* setting aside the decree of the Judge of the Probate Court whereby a will bearing date October 14, 1948, and a codicil thereto bearing date November 3, 1948, were admitted to probate as the last will and a codicil thereto of William Faulkner Jardine who died on the 2nd January, 1949, and directing a new trial. The appellants, two daughters of the testator, ask that that part of the order of the Supreme Court *en banc* which directs a new trial be set aside and that in effect it be declared that the testator died intestate. The respondent, the executor named in the will, cross-appeals and asks that the judgment of the Court of Probate, upholding the will and codicil, be restored.

The Supreme Court set aside the decree of the Court of Probate on the ground that the cumulative effect of three considerations led them to the conclusion: "that the evidence, as presented in this case, was not in a satisfactory form to enable the trial judge to assess the factual elements at their real value, or to enable an Appellate Court to decide whether or not the pronouncement of the Court below was a proper one."

After consideration of all the evidence and of the reasons for judgment of the learned trial judge and bearing in mind the advantage which he enjoyed of seeing and hearing the witnesses I have formed the opinion, although not without hesitation, that an Appellate Court could not say that he had reached a wrong conclusion. I am further of opinion that the considerations which moved the Supreme Court, weighty though they be, were not sufficient to warrant the setting aside of the judgment admitting the documents to

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probate; but as the majority of this Court are of opinion that the order directing a new trial should be affirmed I will refrain from discussing the evidence.

I do, however, wish to say something about the third consideration which moved the Supreme Court to direct a new trial lest it should be inferred from the disposition which I think should be made of the appeal that I do not regard it as serious. The senior counsel for the respondent had been the draftsman of the testator's will and codicil. He was called as a witness in support of the will. His evidence was of importance. Notwithstanding the objections of counsel for the appellants he continued as counsel thereafter, cross-examining several witnesses and giving evidence in reply. This was not one of those cases which occasionally, although very rarely, arise in which some quite unexpected turn of events in the course of a trial makes it necessary to hear a counsel in the case as a witness. It must have been obvious at all times that the counsel in question was an essential witness and it was "irregular and contrary to practice"—to use the words of Humphrey J., concurred in by Singleton and Tucker JJ. in *Rex* v. *Secretary of State for India* (1)—that he should act as counsel and witness in the same case. The fact that one of the counsel for the appellants followed the same course does not render what was done less objectionable.

There is no doubt but that the earlier cases in this country and in England decided that the fact of counsel also acting as a witness on behalf of his client was in itself a ground for ordering a new trial. It was so held by Patteson J. in *Stones* v. *Byron* (2) and by Erle J. in *Deane* v. *Packwood* (3), 395 n, although in the latter case it appears from the report in 8 L.T. (O.S.) 371, that counsel conceded that a new trial must be granted on the authority of *Stones* v. *Byron*. A similar view was expressed in New Brunswick in *Shields* v. *McGrath* (4) and in Ontario in *Benedict* v. *Boulton* (5) and *Cameron* v. *Forsyth* (6). It may be that in England the matter is still in doubt. I have found no case there which expressely over-rules *Stones* v. *Byron*. With great respect for the contrary view expressed by Harrison C.J. in *Davis* v. *The Canada Farmers Mutual*

(1) [1941] 2 K.B. 169 at 175.
(2) (1846) 4 Dow. & L. 393.
(3) 4 Dow. & L. 395 Note (6).
(4) (1847) 5 N.B.R. 398.
(5) (1847) 4 U.C.Q.B. 96.
(6) 4 U.C.Q.B. 189.

Insurance Co. (1), at page 481 it appears to me that *Cobbett* v. *Hudson* (2), may not be of general application as in that case the plaintiff who, it was held, should have been allowed to testify was acting as his own advocate. In Halsbury 2nd Edition, Vol. 2 at page 523 the learned authors say:

> It is doubtful whether a person who appears as counsel can give evidence in the same proceeding; such a course is very unusual.

In *Eastland* v. *Burchall* (3) there is a dictum of Lush J. concurred in by Mellor J. indicating that in the view of those learned judges such evidence is admissible but it was clearly *obiter*. The form of expression employed by Humphreys J. in *Rex* v. *Secretary of State for India* (*supra*) would appear to shew rather that counsel ought not to give evidence than that such evidence is legally inadmissible.

However the matter may stand in England, it appears to me that such evidence is at present legally admissible in Canada.

In *Brett* v. *Brett* (4) Ewing J. after careful consideration, and under special circumstances, admitted such evidence. His judgment was affirmed (5), in a unanimous judgment of the Court of Appeal for Alberta delivered by Harvey C.J. who said at page 372:

> Much criticism is offered to the evidence of Mr. Goodall, who acted as counsel throughout the major part of the trial, which evidence was received only as the result of an application made after the evidence was all thought to have been concluded. The plaintiff appeals from the order allowing the evidence to be given but it was clearly a matter for the discretion of the trial Judge, and he quite properly considered that the matter of first importance was the right of the litigants which should not be jeopardized by any oversight or mistake on the part of solicitor or counsel. Certainly the trial Judge should, and no doubt did, examine the evidence with much care, but the weight to be given to it was entirely for his consideration and if he thought proper to accept it as truthful, as he did, we would not be justified in differing from him.

In *Ward* v. *McIntyre* (6), Hazen C.J. delivering the unanimous judgment of the Court of Appeal for New Brunswick approved the following statement from Wigmore on Evidence:

> There is then, in general, no rule, but only an urgent judicial reprobation forbidding counsel or attorney to testify in favour of his client.

(1) (1876) 39 U.C.Q.B. 452.
(2) (1852) 1 E. & B. 11; 118 E.R. 341.
(3) (1878) 3 Q.B.D. 432 at 436.
(4) (1937) 2 W.W.R. 689.
(5) (1938) 2 W.W.R. 368.
(6) (1920) 56 D.L.R. 208 at 210.

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To the same effect is the judgment of the Court of Appeal for Ontario in *Davis* v. *The Canada Farmers Mutual Insurance Co.* (*supra*) in which, at pages 477 to 483, Harrison C.J. reviews the earlier cases in England and this country.

In *Major* v. *Higgins* (1), Howard J. after a full review of the authorities concludes at page 283:

> But, although it is widely acknowledged and authoritatively asserted to be contrary to the ethics and against the best interests of the profession for an advocate to testify on behalf of his own client in a case which he is conducting, I can find no rule of law that forbids him to do so. A canon of legal ethics, no matter how strongly approved by the members of the profession, and by the public too for that matter, has not the force of a rule of evidence and cannot be applied as such.

In Prince Edward Island in *Grady* v. *Waite* (2) Arsenault V.C. reaches a similar conclusion.

While these decisions bring me to the conclusion that the evidence of counsel in the case at bar was legally admissible, each of them contains, as indeed does every case which I have read in which the matter is discussed, a clear expression of judicial disapproval of counsel following such a course. Nothing would be gained by quoting these expressions at length. An example is that of Ritchie C.J. in *Bank of British North America* v. *McElroy* (3):

> It is the privilege of the party to offer the counsel as a witness: but that it is an indecent proceeding, and should be discouraged, no one can deny * * *

If such expressions of judicial opinion extending over a century, coupled with the repeated pronouncements of the representatives of the Bar to the same effect, have not availed to prevent counsel following such a course it is perhaps idle to hope that a further similar expression will prove effective and I shall only say that I am in agreement with the statement of Ritchie C.J., quoted above.

Having formed the opinion that the judgment of the learned trial judge should be restored it becomes unnecessary for me to decide whether the Supreme Court of Prince Edward Island had power to direct a new trial, but the reasons of my brothers Kerwin and Kellock satisfy me that it has such power.

(1) (1932) 53 Que. K.B. 277. (2) (1930) 1 M.P.R. 116 at 121.
(3) (1875) 15 N.B.R. 462 at 463.

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I would dismiss the appeal, allow the cross-appeal and restore the judgment of the learned trial judge including his order as to costs. The respondent should have his costs of this appeal, of the cross-appeal and of the appeal to the Supreme Court of Prince Edward Island out of the estate and there should be no other order as to costs.

Appeal and cross-appeal dismissed without costs.

Solicitor for the appellants: *K. M. Martin.*

Solicitor for the respondent: *Malcolm MacKinnon.*

THOMAS C. DOUGLAS (DEFENDANT) ....APPELLANT;

AND

WALTER A. TUCKER (PLAINTIFF).....RESPONDENT.

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*Oct. 16, 17, 18.

*Dec. 17

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Libel—Defamation—Public attack on political opponent—Statement that action for fraud is pending against plaintiff—Whether defendant liable for report in newspaper—Whether defendant must prove the fraud—Defence of privileged occasion—Whether Statement of Claim in action for fraud admissible—Mis-direction.

In the course of a provincial election campaign in which the appellant and the respondent were candidates and leaders of opposing parties, the appellant, after the respondent had publicly denied as "entirely without foundation" the charge made by the appellant that the respondent had charged interest rates as high as 15 per cent, made the following public speech: "Walter Tucker is facing a charge of fraud laid before the courts in August last year and which the presiding Judge very conveniently adjourned hearing until after the Provincial election . . . and at this time, Tucker, Goble and Giesbrecht are being sued for depriving by fraud these people of their property . . . there is this much foundation for my remarks that incidentally Tucker got the mortgage and a second party involved in the agreement lost their farm to Tucker and the defunct Investment Company in 1939 . . . I am sorry this was introduced but Tucker should not infer my remarks are without foundation."

This speech with some variations in wording was printed in a local newspaper after a reporter, known to the appellant to be such, had showed him his report and after the appellant had read it and had suggested a few changes which were made. The action for damages for libel and slander was dismissed by the trial judge following the verdict of the jury but the Court of Appeal for Saskatchewan ordered a new trial.

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*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Locke and Cartwright JJ.

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The claim for slander was withdrawn from the jury by the trial judge after he had ruled out the innuendo assigned to the words by the respondent. These two rulings were not questioned before this Court.

Held: The appeal should be dismissed.

The words complained of, in their natural and ordinary meaning, are capable of a defamatory meaning as they appear to impute to the respondent that he has been accused of fraud.

In order to justify the statement that respondent was alleged to have acted fraudulently and deprived persons of their property by fraud, it must be pleaded and proved that he did in fact act fraudulently and did in fact deprive persons of their property by fraud; it is of no avail to plead that some person or persons other than the defendant had in fact made such allegations. (*Watkin* v. *Hall* (1868) L.R. 3 Q.B. 396).

Assuming, without deciding, that a motion to strike out a Statement of Claim heard in Chambers by the Local Master is a judicial proceeding in open Court within the rule in *Kimber* v. *Press Association Ltd.* [1893] 1 Q.B. 65), it is clear that the words complained of do not purport to be a report of such proceeding, nor can they be fair comment since they do not purport to be comment or expressions of opinion.

Appellant, although entitled to reply to the charge that he had publicly made a false and unfounded statement, lost the protection of qualified privilege by stating that the respondent was facing a suit for fraud and was said to have deprived certain persons of their property by fraud, all of which went beyond matters reasonably germane to the charge made by the respondent. It is for the judge to rule as a matter of law whether the occasion was privileged and whether the defendant published something beyond what was germane and reasonably appropriate to the occasion so that the privilege had been exceeded. (*Adam* v. *Ward* [1917] A.C. 309).

The privilege of an elector is lost if the publication is made in a newspaper, and the view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the facts that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is untenable and is not contemplated by s. 8(2) of the *Libel and Slander Act,* R.S.S. 1940, c. 90.

There was evidence upon which, on a proper charge, the jury could decide that the defendant, in what occurred between him and the reporter, knew and intended that the report would be published in the newspaper and that such publication was publication by the defendant. (*Hay* v. *Bingham* 11 O.L.R. 148).

The variance between the words pleaded and the words published in the newspaper is not fatal to this action as there appears to be no substantial difference between the words as pleaded and as proved.

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APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the dismissal of the respondent's action for defamation by the trial judge, following the verdict of a jury, and ordering a new trial.

E. C. Leslie, K.C., for the appellant. On the evidence, it is submitted that the appellant was not a publisher of the libel nor in any way responsible for its publication. It is further submitted that the appellant was not in law responsible for the publication: Gatley "On Libel and Slander", 3rd Ed. at p. 102. The appellant relies upon the case of *Parkes* v. *Prescott* (2) to say that whether he hoped or not that his speech would be published, he made no request to have it done. The authorities show that there must be some act on the part of the defendant whereby express authorisation or indeed a request can be made out on the part of the defendant to have the statement published. It is not sufficient to prove that the publication was the natural and probable consequence of the alleged statement having been made; that sort of evidence is not relevant in determining whether or not the defendant was a publisher. The appellant did not constitute the newspaper his agent for the publication: he had no control over the newspaper nor the reporter. On this point, the cases of *Ward* v. *Weekes* (3) and *Weld-Blundell* v. *Stephens* (4) are relied on and the case of *Hay* v. *Bingham* (5) is distinguished as being obiter. There was therefore no request to publish and furthermore the natural and probable result does not here amount to a request.

There was between the words pleaded and those proved a variance, and as there was no difficulty in ascertaining the exact words used, the relaxation of the old strict rule respecting variance does not apply. See Gatley (*supra*) p. 609.

The statement made was not the repetition of a rumour nor was it analogous. There is no libel to say of a man that he is being sued for fraud, if it is true. The contents of the Statement of Claim was not disclosed to the public. There are no cases holding a defendant liable for merely stating that the plaintiff has been sued or that

(1) [1950] 2 D.L.R. 827; 2 W.W.R. 1.
(2) L.J. Exch. 105.
(3) 131 E.R. 81.
(4) [1920] A.C. 956.
(5) 11 O.L.R. 148.

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a charge has been laid against him. When such a statement is made, it is sufficient to justify the allegation that such a suit has been brought and that it is not necessary to justify the truth of the allegations contained therein: *Hennessy* v. *Wright* (1) and *Fitch* v. *Lemon* (2).

Independently of any question of privilege that may attach to the publication of judicial documents, such as pleadings, it is not defamatory to say that a person has been sued for fraud or charged with a criminal offence. Even if that be wrong, such a statement may be made after the Statement of Claim or charge has been referred to in Court or Chambers: *Gazette Printing Co.* v. *Shallow* (3) distinguished. Proceedings in Chambers before the Local Master are proceedings in open court. The words "open court" mean proceedings both at trial and in Chambers and are used in contradistinction to the words "in camera". See Gatley (*supra*) p. 332.

The trial judge did not mis-directed himself when he held that the statement was made on a privileged occasion. Reliance is placed on two grounds of privilege: (*a*) on the ground that the statement was a reply to an attack and (*b*) on the ground that a candidate has a right to bring to the public notice the fitness or otherwise of a candidate: *Laughton* v. *Bishop of Sodor and Man* (4), *Turner* v. *M.G.M. Pictures Ltd.* (5), *Adam* v. *Ward* (6) and Gatley (*supra*) p. 250.

The direction for a new trial was an error for the following reasons: (*a*) the charge was fair to the plaintiff and adverse to the defendant, (*b*) to rely upon non-direction, one must raise it at the trial, which was not done here and (*c*) a new trial should not be lightly granted.

G. H. Yule, K.C., for the respondent. There was sufficient grounds for the Court of Appeal to order a new trial. Relies on the reasons for judgment of the Court appealed from. The appellant is responsible for the publication of the defamatory statements which appeared in the newspaper. This is a matter for the jury and had no bearing on the matter of the judgment for a new trial.

(1) 57 L.J.Q.B. 594.
(2) 27 U.C.Q.B. 273.
(3) (1909) 41 Can. S.C.R. 339.
(4) L.R. 4 P.C. 495.
(5) [1950] 1 All. E.R. 449.
(6) [1917] A.C. 309.

As the words do not purport to be a report of any judicial proceedings, the plea of truth of the matter cannot be sustained.

The claim of the qualified privilege of a candidate fails in view of the evidence of the appellant that he had no intention of trying to influence the electors.

The sting of the libel is that the respondent obtained a farm by fraud, and the defence is not that he was guilty of fraud but that it was true that he had been sued for fraud. That is not a defence to the action: *The Gazette* case (*supra*).

Chambers is not open Court: *Scott* v. *Scott* (1).

It is contempt of Court to publish statements of claims before the case is decided: *Chesshire* v. *Strauss* (2) and *Bowden* v. *Russell* (3).

The statement of Gatley (*supra*) p. 430 is relied on as to the question of variation between the words pleaded and the words proved.

It was prejudicial to the plaintiff and contrary to public policy and fair administration of justice to admit in evidence the Statement of Claim in the action for fraud. The evidence shows that the appellant had had long ago the idea of using the press to libel the respondent.

The charge of the trial judge was most unfair in that he told the jury that the defendant had the privilege to defame the plaintiff.

The judgment of the court was delivered by

CARTWRIGHT J.—This is an appeal from a judgment of the Court of Appeal of the Province of Saskatchewan (4) setting aside the judgment dismissing the action pronounced by Taylor J. following the verdict of a jury and directing a new trial limited to certain issues.

A somewhat detailed statement of the relevant facts is necessary to make clear the questions which have to be determined.

The action is for damages for libel and slander. The alleged slander was published in a speech made by the appellant to a public meeting at Rosthern on June 11, 1948,

(1) [1913] A.C. 445.
(2) 12 T.L.R. 291.
(3) 46 L. Jo. Ch. Div. 414.
(4) [1950] 2 D.L.R. 827; 2 W.W.R. 1.

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in the course of an election campaign. The appellant was at that time, and still is, Premier of Saskatchewan. He was seeking re-election in an election called for June 24, 1948. The respondent was also seeking election in his own constituency of Rosthern and was the Leader of the Opposition.

In the course of the election campaign the respondent had made public statements to the effect that it was the intention of the appellant and his party, if returned to office, to socialize the farm lands in the Province and there seems to be no doubt that the question of the socialization of farm lands was one of the issues being debated in the campaign. On the 8th of June, 1948, at a public meeting in the village of Caron in the Province, the appellant made a statement the effect of which was that the respondent and the party which he was leading were in fact those responsible for taking their lands and homesteads from the farmers in Saskatchewan, that the respondent had signed, as an officer of an investment company, a document dated January 24, 1930, stipulating for interest at the rate of 15 per cent per annum and that as a result of such document and other transactions relating to the land therein described to which the respondent was a party, a farmer and his wife had lost their lands to the investment company, its officers and agents.

On the 10th of June, 1948, the respondent addressed a public meeting at the city of North Battleford in Saskatchewan and referred to the allegations made by the appellant at the public meeting at Caron as being "entirely without foundation."

On the 11th of June, 1948, in addressing a public meeting at the Town of Rosthern the appellant is alleged to have spoken the words on which the claim for slander is founded, and which are set out in the Statement of Claim as follows:

"Walter Tucker is facing a charge of fraud laid before the courts in August last year and which the presiding Judge very conveniently adjourned hearing until after the Provincial election," and the following words, namely: "and at this time, Tucker, Goble and Giesbrecht are being sued for depriving by fraud these people of their property", and the following words, namely: "there is this much foundation for my remarks that incidentally Tucker got the mortgage and a second party involved in the agreement lost their farm to Tucker and the defunct Investment

Company in 1939," and the following words, namely: "I am sorry this was introduced but Tucker should not infer my remarks are without foundation."

It appears that the appellant did not originally plan to refer in his address at Rosthern to the statement made by the respondent at North Battleford intending to reply thereto by publishing a prepared statement in the press; but owing to being asked questions about the respondent's statement that he, the appellant, had made a charge which was entirely without foundation, he decided he ought not to delay but should deal with it in addressing the meeting.

Prior to making this last-mentioned decision the appellant had handed to a newspaper reporter, with whom he was personally acquainted, notes summarizing the speech which he intended to make. These notes, for the reason just mentioned, contained no reference to the respondent's statement made the day before at North Battleford. The reporter, after hearing that part of the appellant's speech, quoted above, left the meeting, typed his report and returned to the meeting. The appellant had finished his speech but it is not clear on the evidence whether the meeting was still in progress. The reporter showed the appellant what he had typed and proposed to send to his paper, the *Star-Phoenix*. The appellant read the report and suggested a few changes which were made by the reporter who then telephoned the story to his paper. It was published the following day in the *Star-Phoenix*. It is on this publication, which the respondent claims was, in law, publication by the appellant, that the claim for libel is based.

The words which appeared in the *Star-Phoenix* differ somewhat from those quoted above from the Statement of Claim. The corresponding passages are as follows:

> Premier T. C. Douglas Friday night said in an address here that Walter Tucker, Liberal party leader, was facing a suit of alleged fraud laid before the court August 14 last year, and which the presiding judge "very conveniently adjourned hearing until after the provincial election." "And at this time," he said "Tucker, Goble and Giesbrecht are being sued for allegedly depriving by fraud these people of their property." "There is this much foundation for my remarks", said Premier Douglas, "that incidentally Mr. Tucker got the mortgage, and a second party involved in the agreement lost their farm to Tucker and the defunct investment company in 1939." "I am very sorry this was introduced but Mr. Tucker should not infer my remarks are without foundation."

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Some time before the events set out above, one Parania Warowa had commenced an action in the Court of King's Bench, Judicial District of Prince Albert, against the respondent and others. The amended Statement of Claim in such action consists of eleven pages, contains allegations of fraud against all the defendants and makes reference to the document of January 24, 1930, mentioned above. A motion launched by the defendants to strike out substantially the whole of this pleading was heard in Chambers before the learned Local Master in January, 1948. Judgment was reserved and the Local Master was requested by counsel for the plaintiff, Warowa, to delay giving judgment to permit the filing of further material. Judgment on this motion had not been given at the date of the publication of the alleged libel, June 12, 1948.

It is next necessary to consider the pleadings in the case at bar. The Statement of Claim sets out that the respondent was on the 11th of June, 1948, a solicitor practising at Rosthern, Saskatchewan, and that he is still so practising, that on such date he was Provincial Leader of the Liberal party in Saskatchewan and was a candidate for the constituency of Rosthern in the election to be held on June 24, 1948 and that the appellant on the 11th of June, 1948, at a meeting in the town of Rosthern, falsely and maliciously spoke and published of and concerning the respondent to the persons at the said meeting, the words quoted above.

An innuendo is pleaded but the learned trial judge ruled that the words were not capable of bearing the meaning assigned to them in the innuendo. This ruling was not questioned in the Court of Appeal or before us and the action must be determined on the words as pleaded in their natural and ordinary meaning without the assignment of any innuendo.

There follows an allegation that the appellant knew that what he said at the meeting of June 11, 1948, would be published in the *Star-Phoenix,* a newspaper published at Saskatoon, that such publication was the natural and probable consequence of the speaking of the said words by the appellant, that after the meeting a newspaper reporter of the *Star-Phoenix* showed the appellant a transcript of the notes which he had made at the meeting and told the

appellant that he proposed to have such transcript published in the *Star-Phoenix* and that the appellant approved the transcript and authorized its publication in the said newspaper. Damages for both slander and libel are claimed.

The Statement of Defence denies the speaking or publishing of the words complained of and sets up that such words are incapable of bearing the meanings assigned in the innuendo.

There are then set out a number of defences pleaded in the alternative in the event of its being held that the appellant did speak, or publish the alleged libel. Those which require consideration are as follows:

First, a plea of justification.

Second, a plea (contained in paragraph 7 of the Statement of Defence) that the words published in so far as they consist of allegations of fact formed part of a fair and accurate report of proceedings publicly heard before a Court exercising judicial authority, namely before the Local Master of the Court of King's Bench of Saskatchewan sitting in Chambers at Saskatoon on or about the 15th of January, 1948, on a motion to strike out the Statement of Claim in an action brought against the respondent and others by one Parania Warowa, that the report was published in good faith for the information of the public and without any malice towards the respondent and was therefore privileged, and that in so far as the words consist of expressions of opinion they are fair comment on a matter of public interest, namely, the said judicial proceedings.

Third, a plea of qualified privilege in which is set out a statement of the facts as to the pending election and the public statements and addresses referred to above, with emphasis on the statement made by the respondent that the appellant had made allegations which were entirely without foundation. The plea concludes:

> . . . If the said words set out in the Statement of Claim were spoken by the Defendant, which he does not admit but denies, then he says they were spoken under the circumstances hereinbefore set out and that as a consequence thereof the occasion was privileged since they were spoken:
>
> (a) by way of refutation of an allegation by the plaintiff which would injure the defendant, his Government, and the Co-operative Commonwealth Federation and with the sole desire of protecting as it was the defendant's duty to protect, the interests of his Government, those of the party of which he is leader, and his own interests.

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(b) to citizens of the Province of Saskatchewan who had a legitimate interest in the election campaign then proceeding and in the matter referred to by the defendant which was one of its principal issues. The words were spoken in good faith and in the honest belief that they were true and without malice toward the plaintiff.

There followed a statement of certain events, alleged to have occurred after the publication of the words complained of, which were said to be pleaded in mitigation of damages but the learned trial judge ruled that such matters were inadmissible and his ruling in that regard was not questioned in the Court of Appeal or before us.

At the trial the learned trial judge ruled that insofar as the respondent's claim was based on slander the words pleaded, without the innuendo, did not fall within any of the classes of spoken words which are actionable without proof of special damage and that there was neither plea nor proof of special damage. He accordingly withdrew the claim based on slander from the jury. This ruling was upheld in the Court of Appeal and was not questioned before us. We are concerned, therefore, only with the claim for libel.

I do not think it necessary to go at length into the question whether the words as pleaded are capable of a defamatory meaning. I agree with the statement in Odgers on Libel and Slander, 6th Edition, page 16, that "any printed or written words are defamatory which impute to the plaintiff that he has been guilty of any . . . fraud, dishonesty . . . or dishonourable conduct, or has been accused or suspected of any such misconduct," and the words complained of in their natural and ordinary meaning appear to me to fall within this statement. I am in agreement with the Court of Appeal that at the new trial the presiding judge should instruct the jury as a matter of law that the words are capable of being defamatory.

The grounds mainly relied upon by counsel for the appellant were those raised in the first, second and third alternative pleas referred to above and the following:

(i) Lack of evidence on which it could be found that the defendant was responsible in law for the publication in the *Star-Phoenix,* and

(ii) Variation between the words of the alleged libel as pleaded and as actually published.

The plea of justification was contained in paragraph 6 of the Statement of Defence and was in general words as follows:

> The defendant . . . says that the said words in their natural and ordinary meaning are true in substance and in fact.

Pursuant to an order of the Court, the appellant delivered the following particulars of this plea:

> With reference to paragraph 6 of the Statement of Defence, the defendant says that he intends to prove only that in the judicial proceedings referred to in the Statement of Defence one Parania Warowa made allegations of fraud against the plaintiff, particulars of which allegations are set out in paragraph 7 of the Statement of Defence.

In my opinion paragraph 6 of the Statement of Defence as clarified by the particulars given is not a plea of justification at all. The sting of the words complained of being that the respondent is alleged to have acted fraudulently and to have deprived persons of their property by fraud they could be justified only by pleading and proving that he did in fact act fraudulently and did in fact deprive persons of their property by fraud. It is of no avail to plead that some person or persons other than the appellant had in fact made such allegations. This appears to me to be so well settled as to render it unnecessary to refer to the authorities other than the judgments of Blackburn J. and Lush J. in *Watkin* v. *Hall* (1). The circumstance that a libel, which a defendant has repeated rather than originated, was first published in some legal proceeding can have no effect on the plea of justification although it may become relevant to a plea that the publication by the defendant was protected by privilege.

As to the second plea mentioned above, there is no doubt that as stated by Lord Esher in *Kimber* v. *Press Association Ltd.* (2):

> The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

The question whether the motion to strike out the Statement of Claim in the Warowa action heard in Chambers by the Local Master was a judicial proceeding in open court falling within this rule was fully argued before us but does not appear to me to require decision in this case.

(1) (1868) L.R. 3 Q.B. 396. (2) (1893) 1 Q.B. 65 at 68.

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Assuming, without deciding, that such question should be answered in the affirmative, it is clear that the words complained of do not purport to be a fair and accurate report of the proceeding before the Local Master. They do not purport to be a report of such proceeding at all. For the same reason the concluding portion of this plea is not maintainable. The words complained of cannot be fair comment for they do not purport to be comment or expressions of opinion. They are simply statements of fact.

The third plea mentioned above, that of qualified privilege, is made on two distinct bases.

The first of these is that the respondent in his address at North Battleford and in the public press had attacked the appellant, that the words complained of were published by the appellant in answer to such attack, and that the appellant was entitled in making such reply to address the same audience, as that which the respondent had selected, this is to say, the whole world. It is argued that the appellant was attacked by the respondent when the latter referred to statements made by the former as being "entirely without foundation", that this amounted to a charge that the appellant had publicly made a statement which was false and unfounded. In my view the appellant was entitled to reply to such a charge and his reply would be protected by qualified privilege, but I think it clear that this protection would be lost if in making his reply the appellant went beyond matters which were reasonably germane to the charge which had been brought against him. It is for the judge alone to rule as a matter of law not only whether the occasion is privileged but also whether the defendant has published something beyond what was germane and reasonably appropriate to the occasion so that the privilege does not extend thereto. See *Adam* v. *Ward* (1) at pages 318, 321, 328, 329, 332 and 340.

In my view the claim of qualified privilege made on this basis in the case at bar fails. It is true as was said by Lord Shaw of Dunfermline in *Adam* v. *Ward* (*supra*) at page 347, that the whole question of the repudiation of a charge claimed to be false has not to be weighed in nice scales; but it was, I think, going entirely beyond anything

(1) [1917] A.C. 309.

that was necessary to the refutation of the charge made by the respondent to state that he was facing a suit for fraud and was said to have deprived certain persons of their property by fraud. The charge which the respondent had made against the appellant was in substance that the appellant had falsely stated that he, the respondent, had been a party to the exaction of 15 per cent interest on a mortgage. It was open to the appellant in replying to this charge to bring forward any matter going to shew that his statement was true but the allegation that the plaintiff had been sued for fraud and had taken other persons' property by fraud was unconnected with the matters in controversy.

The second basis on which qualified privilege is asserted is that the defendant as an elector, a candidate for election and the leader of his party had a duty to communicate to those having a legitimate interest in the result of such election facts which he honestly believed to be true, relevant to the fitness, or otherwise, for office of other candidates offering themselves for election.

It has often been held that qualified privilege attaches to communications made by an elector to his fellow electors of matters regarding a candidate which he honestly believes to be true and which, if true, would be relevant to the question of such candidate's fitness for office. See, for example, Gatley on Libel and Slander, 3rd Edition, pages 250 and 251 and cases there cited. It is unnecessary on this appeal to decide whether such privilege is limited to publications made by an elector and to an elector or electors all of whom have a right to vote for the candidate about whom the communication is made and, if it is not so strictly limited, what is its extent. It is settled that whatever may be the extent of such a privilege it is lost if the publication is made in a newspaper.

Duncombe v. *Daniell* (1) was an action for libel based on publication in a newspaper of statements defamatory of a candidate for election. There was a plea of qualified privilege. At page 102 of the last-mentioned report, Lord Denman C.J. said:

> However large may be the privileges of electors, it would be extravagant to suppose, that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate.

(1) (1837) 8 C. & P. 222; 2 Jur. 32; 1 W.W. & H. 101.

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The other members of the Court, Littledale, Williams and Coleridge, JJ. concurred. It is clear from the judgment in this case and also from expressions in *De Crespigny* v. *Wellesly* (1) and in *Adam* v. *Ward* (*supra*), that publication in a newspaper is publication to the world.

Duncombe v. *Daniell* is cited as an authoritative statement of the law in Gatley on Libel and Slander (*supra*) at pages 251 and 278 and in Odgers on Libel and Slander, (*supra*), at pages 171 and 246. The principle which it enunciates, that the privilege of an elector will be lost if the publication is unduly wide, has been applied repeatedly, see for example: *Anderson* v. *Hunter* (2), *Bethell* v. *Mann* (3) and *Lang* v. *Willis* (4).

The view that a defamatory statement relating to a candidate for public office published in a newspaper is protected by qualified privilege by reason merely of the facts that an election is pending and that the statement, if true, would be relevant to the question of such candidate's fitness to hold office is, I think, untenable. The terms of section 8 of the *Libel and Slander Act,* R.S.S. 1940, c. 90, and particularly subsection 2 thereof would seem to indicate that such a view was remote from the contemplation of the Legislature of Saskatchewan.

In my opinion, the plea of qualified privilege on this basis also fails.

For these reasons I am respectfully of opinion that the learned trial judge should have ruled before the case went to the jury that no case of qualified privilege had been made out. I can not find that the learned trial judge made a clear and definite ruling on this point but the effect of his charge was to give the jury to understand that the statements complained of were protected by privilege and that such protection would be lost only if the jury found that the appellant had acted with express malice.

It is next necessary to consider whether there was evidence on which the jury could find that the publication in the *Star-Phoenix* was publication by the defendant. As there is to be a new trial it is not desirable to discuss the evidence but the law should be made clear to the new jury.

(1) (1829) 5 Bing. 392.
(2) (1891) 18 R. 467.
(3) Times, October 29, 1919.
(4) 52 C.L.R. 637 at 667, 672.

Gatley on Libel and Slander, (*supra*) at pages 439 and 440 states the position correctly

> A man who writes a libellous article or letter, and sends it to the editor of a newspaper is liable for the damage caused by such publication. An express request to publish the article or letter need not be proved; the fact that he sent it to the editor is sufficient evidence that he authorized or intended it to be published . . . If a man hands a copy of a slanderous speech to a reporter to publish or requests a reporter to take the speech down and publish it, or an outline or summary of it, he will be taken to constitute the reporter an agent for the purpose of publication, and be answerable for the result.

In Odgers on Libel and Slander (*supra*) it is put thus at page 141:

> Thus, it (a request to print or publish) may be inferred from the defendant's conduct in sending his manuscript to the editor of a magazine, or making a statement to the reporter of a newspaper, with the knowledge that they will be sure to publish it, and without any effort to restrain their so doing.

In *Hay* v. *Bingham* (1), the Court of Appeal for Ontario decided:

> There was evidence from which the jury might infer that the defendant knew that he was speaking to a reporter and speaking for publication, and that he authorized what he said to be published in a newspaper. It was not necessary that there should have been an express request to publish: Odgers on Libel and Slander, 4th ed. p. 161. The defendant's object, as he admits, was to put himself right, as he thought, with the public. He must have known that this was not likely to be accomplished by a mere private explanation to the person he was speaking to; and his visit to the newspaper office on the following morning, and his conversation there with the reporter plainly suggest the inference that he had authorized the report and was substantially satisfied with it.

It is true that in that case the Court also decided that the words complained of were not capable of the meaning ascribed to them and therefore dismissed the action but the extract quoted is part of the ratio decidendi and with it I agree. A jury would be entitled to consider all the circumstances and I agree that there was evidence upon which, on a proper charge, they could decide that the defendant, in what occurred between him and the reporter, knew and intended that the report would be published.

(1) 11 O.L.R. 148 at 153.

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There remains the defence that the alleged libel, as pleaded, varied from the words actually published in the newspaper which, owing to the claim for slander having been disposed of, is the only publication with which we are concerned. There were two variations between the words as published and as pleaded: (i) The opening words of the alleged libel as pleaded are: "Walter Tucker is facing a charge of fraud laid before the courts . . .". As published, the corresponding words were: "that Walter Tucker, Liberal Party Leader was facing a suit of alleged fraud laid before the court . . .". (ii) The next words, as pleaded, are: "And at this time Tucker, Goble, and Giesbrecht are being sued for depriving by fraud these people of their property." In the corresponding words as published, the word "allegedly" appears before the word "depriving."

Counsel for the respondent did not ask at the trial to have the statement of claim amended to make the words pleaded conform exactly to the words as published and we therefore have to consider whether the variance set out above is fatal to the action. In my opinion it is not. The statement in Gatley on Libel and Slander (*supra*) at page 609: "If the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial," is supported by the cases there cited. The sting of the words as pleaded is that the respondent is charged with fraud and is being sued for depriving certain people of their property by fraud. As these words clearly import that the charge and suit are pending the addition or omission of the words "alleged" or "allegedly" is, I think, of little significance. A pending charge or a pending suit partakes of necessity of the nature of an allegation as yet not established and there appears to be no substantial difference between the words as pleaded and as proved.

For the above reasons I am of opinion that the order of the Court of Appeal directing a new trial limited to the issues set out in the formal order of that Court should be affirmed.

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At the trial, against the objection of counsel for the plaintiff, the learned trial judge admitted in evidence the document of January 24, 1930 and the Statement of Claim in the Warowa action and permitted them to be marked as exhibits. I agree with the Court of Appeal that both these documents should be excluded at the new trial. Neither is relevant to any of the issues to which such new trial is limited by the order of the Court of Appeal.

No other question having been argued before us, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitor for the respondent: *Gilbert H. Yule.*

1951
*Feb. 22, 23
*Oct. 12

KONRAD JOHANNESSON and HOLMFRIDUR JOHANNESSON,.. } APPELLANTS;

AND

THE RURAL MUNICIPALITY OF WEST ST. PAUL, ... } RESPONDENT;

AND

THE ATTORNEY GENERAL OF MANITOBA, ... } INTERVENANT;

AND

THE ATTORNEY GENERAL OF CANADA, ... } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Constitutional Law—Aeronautics—Airports—Aerodromes—Licensing and Regulation thereof—Within Parliament's exclusive jurisdiction—Beyond Provincial Legislature's competence—The British North America Act—The Municipal Act (Manitoba) R.S.M. 1940, c. 141, s. 921—The Aeronautics Act, R.S.C. 1927, c. 3, s. 4.

Section 921 of *The Municipal Act* (Manitoba) R.S.M. 1940, c. 141, provides that any municipality may pass by-laws for licensing and within defined areas preventing the erection of aerodromes or places where aeroplanes are kept for hire or gain. The appellants, holders of an air transport license from the Air Transport Board of Canada, secured an option on land within the respondent municipality for the purpose of a licensed air strip. Before the transaction was completed the respondent under authority of s. 921 passed a by-law prohibiting the establishment of an aerodrome within that part of the municipality in which the optioned lands were situate.

Held: The subject of aeronautics is within the exclusive jurisdiction of Parliament consequently section 921 of *The Municipal Act* and the by-law in question passed thereunder are *ultra vires*.

In re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54; *In re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304; *Attorney General for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193, referred to.

Judgment of the Court of Appeal for Manitoba [1950] 1 W.W.R. 856, reversed.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) dismissing (Coyne J.A. dissenting) the appellants' appeal from the judgment of Campbell J. (2) of

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ.

(1) [1950] 1 W.W.R. 856; 3 D.L.R. 101.

(2) [1949] 2 W.W.R. 1; 3 D.L.R. 694.

their application for a declaration that s. 921 of *The Municipal Act,* R.S.M., 1940, c. 141, and by-law No. 292 of West St. Paul R.M. are *ultra vires.*

F. P. Varcoe K.C., A. G. Eggertson, K.C. and *D. W. Mundell, K.C.* for the Attorney General of Canada, Intervenant. The trial judge erred in holding that the authority of Parliament in relation to "aeronautics" arose only under s. 132 of the B.N.A. Act. He and the judges in the majority in the Court of Appeal erred in holding (*a*) that control of the selection or location of aerodromes and the rights of persons to engage in aeronautical activities are not part of the subject matter of "aeronautics" within the authority of Parliament and outside s. 92; (*b*) that even if these are within the subject matter of "aeronautics" the legislature of a province may legislate in relation to them from the aspect of property and civil rights and the legislation will be operative so long as it is not overridden by federal legislation; (*c*) that s. 921 is not overridden by the *Aeronautics Act.*

S. 921 of *The Municipal Act,* R.S.M. 1940, c. 141 is *ultra vires.* If a provincial statute is not authorized under any legislative head of s. 92 of the B.N.A. Act, (or ss. 93 and 95 not relevant here), then it is *ultra vires. Citizens Insurance Co.* v. *Parsons* (1). S. 921 is not legislation in relation to "Municipal Institutions," but to a power of control and regulation conferred on them. It is not legislation in relation to any other head in s. 92. The decision in the *Aeronautics Reference,* (2) that Parliament may enact legislation in relation to "aeronautics" is a decision that as a legislative subject matter "aeronautics" does not fall in s. 92. The heads of s. 92 must, therefore, be interpreted as not including any part of "aeronautics" within the enumeration in s. 91. *John Deere Plow Co. Ltd.* v. *Wharton* (3); *Great West Saddlery Co.* v. *The King* (4); *A.G. of Alta.* v. *A.G. of Can.* (*Debt Adjustment* case), (5); *A. G. of Can.* v. *A.G. of Que.* (*Bank Deposits Case*) (6); *Postal Reference* (7). Further, since it was held that Parliament's authority also rests on the opening words of s. 91, this is a decision that the subject matter "aeronautics" as

(1) 7 A.C. 96 at 109.
(2) [1932] A.C. 54.
(3) [1915] A.C. 330 at 340.
(4) [1921] 2 A.C. 91 at 116.
(5) [1943] A.C. 356.
(6) [1947] A.C. 33 at 43.
(7) [1948] S.C.R. 248.

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a whole falls outside s. 92 since authority to legislate under these words is "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces". Moreover, it was expressly stated that "aeronautics" does not fall within either head 13 or head 16. Further, as a matter of fact, "aeronautics" as a subject matter of legislation is clearly one that from its inherent nature is of national concern *Re Canada Temperance Act* (1). Control and regulation of the use of the air for transportation and control of the earth's surface for the use of the air for transportation is indivisible. Regulation for local purposes cannot be separated from regulation for the purposes of the heads of s. 91 or for interprovincial or international purposes, which are clearly of national concern. The Attorney General also relies on the judgments of the judges in the Court of Appeal that "aeronautics" is a subject matter for which Parliament may legislate under s. 91. Since "aeronautics" is a subject matter on which Parliament can legislate it falls outside s. 92 and the authority of the province. S. 921 must therefore be outside the authority of the Legislature of Manitoba since it is legislation in relation to the subject matter of "aeronautics". To ascertain the "matter" in relation to which legislation is enacted, regard must be had to the "pith and substance" or "the true nature and character" of the legislation. To determine this, regard is to be had to the effect and the object or purpose of the legislation. The question is—At what subject matter is the legislation "aimed" or "directed"? *A.G. of Ont.* v. *Reciprocal Insurers* (2); *A.G. for Alta.* v. *A.G. for Canada* (*Bank Taxation* case) (3); *A.G. for Can.* v. *A.G. for Que.* (*Bank Deposits* case) (4). The purpose and effect of s. 921 are to control and regulate the use of part of the surface of the earth for the landing and taking off of aircraft and to abrogate rights and liberties of persons to use their property for aeronautical activities. It is, therefore, directed at "aeronautics". These are matters that fall within "aeronautics". It was so held in the *Aeronautics Reference*. Moreover, apart from authority, "aeronautics" must necessarily include control of use of the earth's surface in connection with the use of the air

(1) [1948] S.C.R. 248.
(2) [1924] A.C. 328 at 337.
(3) [1939] A.C. 117 at 130.
(4) [1947] A.C. 33 at 44.

and of rights of persons for such purposes and the control and regulation of the use of the air and of the means of using it as a mode of transport. Control in every respect of the places where airplanes may land and take off, including the location of such places, is quite as essential a part of the control of aeronautics as control of where and the conditions under which airplanes may fly. In legal terms, this means that Parliament may legislate to vary or abrogate existing rights, powers or liberties or to create new rights, powers or liberties with respect to the ownership or operation of aircraft in the air or on the ground with respect to the use of property in connection with the operation of aircraft and aeronautical activities. This is the legal content of the subject matter "aeronautics". It follows that these rights, powers and liberties are not within the rights of "Property" and "Civil Rights" in the Province as these terms are used in s. 92. The trial judge and the judges in the majority in the Court of Appeal erred in holding that control of the location of aerodromes is not included in the subject matter "aeronautics" and in holding that the use of property for an airport is a "Civil Right" in the Province that falls in s. 92. The Provincial Legislature cannot enact legislation to control or regulate for any purpose the use of the earth's surface for aeronautical activities or the rights and liberties of persons to engage in aeronautical activities even though it might appear that the legislation is enacted from an aspect other than "aeronautics". Such legislation deals with an essential part of the subject matter "aeronautics". It is therefore wholly outside s. 92. *Postal Reference* (1). The judges in the court below erred in holding that control of locations for airports or of the right to use property for airports is not an essential part of the subject matter "aeronautics". Even if s. 921 could be enacted by the Legislature from some aspect other than aeronautics, it is overridden by s. 4 of the *Aeronautics Act,* which is valid federal legislation. *A.G. for Alta.* v. *A.G. for Can. (Debt Adjustment Reference)* (2) since s. 921 confers power to obstruct and interfere with the powers conferred by s. 4 of the *Aeronautics Act.* The judges in the Court of Appeal erred in holding that the powers conferred by s. 921 are not overridden by s. 4. They relied on cases where it had been held that there might be

(1) [1948] S.C.R. 248.

(2) [1943] A.C. 356 at 375.

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a dual requirement under provincial and federal legislation for obtaining licenses. In such cases, however, the licenses were not directed at exercising a control for the same purpose or to achieve the same effects, but were required for different purposes and the discretions, if any, to grant or refuse the licenses involved different considerations. The *Aeronautics Act* and the Regulations made pursuant to its authority are valid federal legislation, within the authority of Parliament in relation to the subject matter "aeronautics". Even if Parliament had no authority in relation to "aeronautics" as a subject matter outside of s. 92, the *Aeronautics Act* is valid legislation for the carrying out of the International Civil Aviation Convention of 1944. Parliament has authority to carry out this Convention under s. 91. *Radio Reference* (1). Conventions of this kind, including the International Civil Aviation Convention, are distinguishable from the very exceptional type of conventions under consideration in the *Labour Conventions Reference* (2). The International Civil Aviation Convention, falls under the decision in the *Radio Reference*. Parliament has, therefore, legislative authority to carry out its terms. This being so, the Aeronautics Reference is an authority showing that the *Aeronautics Act* is within Parliament's authority to carry out the Convention.

C. I. Keith K.C. for the appellants. The importance of this appeal is that the power to prohibit the creation of aerodromes which the judgment appealed from holds is possessed by the Province of Manitoba will be a serious obstacle to the development of aeronautics if allowed to stand, and particularly if similar legislation is passed by the other provinces. It has been assumed that the effect of the judgment in the *Aeronautics Reference* (*supra*) was to place every phase of aeronautics as dealt with in the *Aeronautics Act* in the exclusive jurisdiction of the Parliament of Canada. On no reported judgment prior to this case has doubt been cast on this conclusion and in at least three subsequent judgments of the Privy Council, it has been commented on as having this effect. The *Radio* case, the *Labour* case and the *Canada Temperance Federation* case (*supra*). Once it is acknowledged that aeronautics is within the exclusive power of Parliament, the principles

(1) [1932] A.C. 304 at 312. (2) [1937] A.C. 326.

which have been applied to railways within the Dominion jurisdiction are applicable to the subject of aeronautics. *C.P.R.* v. *Notre Dame de Bonsecours Parish* (1). The appellants rely generally on the dissenting judgment of Coyne J.A. and the authorities there cited.

W. J. Johnston, K.C. for the Attorney General of Manitoba, Intervenant. There are two points in issue (*a*) Does the decision in the *Aeronautics Reference* (2) place the subject of aeronautics in all its aspects within the legislative competence of the Dominion? (*b*) Assuming that such is the case, is the Province precluded from enacting and enforcing zoning regulations with respect to the location of airports? Coyne J.A. in his dissenting judgment (3) erred in finding that the *Aeronautics Reference* placed the subject matter of aeronautics solely and exclusively within the legislative competence of the Dominion. The correct interpretation is to be found in the judgment of the trial judge, Campbell J. (4)—In the alternative, even if the Dominion derives legislative power from sources other than s. 132 it is not such a power as would preclude the Province from dealing with the location of airports as a zoning regulation since that could hardly be classed as legislation on aerial navigation. The Intervenant relies upon the reasons of Dysart and Adamson J.J.A. concurred in by McPherson C.J.M. and Richards J.A. (3) and submits that the appeal should be dismissed.

The *Aeronautics* case goes no further than to hold that the Dominion's power to pass the aeronautics legislation then under review was derived from s. 132 of the B.N.A. Act and not under an express delegation of legislative power over the subject "aeronautics." The Province relies upon subsequent decisions of the Privy Council in which the judgment in the *Aeronautics* case has been explained and clarified. The first case was the *Radio* case (5). The judgment delivered by Viscount Dunedin, a member of the Board in the *Aeronautics* case, gave the chief ground of the decision in the latter case as s. 132 of the B.N.A. Act.

(1) [1899] A.C. 367; 68 L.J.P.C. 54.
(2) [1932] A.C. 54.
(3) [1950] 1 W.W.R. 856.
(4) [1949] 2 W.W.R. 1.
(5) [1932] A.C. 304; 1 W.W.R. 563.

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In *A.G. Can.* v. *A.G. Ont* (1) (Reference re labour legislation). Lord Atkin, a member of the Board in the *Aeronautics* case, also confined it to s. 132 (pp. 350 A.C.; p. 309 W.W.R.). In the *Labour Legislation Reference* the conventions under review were made by Canada under its new status as a Sovereign State and s. 132, which relates to treaties made by Great Britain, did not apply. It was therefore contended by the Dominion that the subject matter of the legislation had become one of national concern and, in support of the contention, the *Radio* and *Aeronautics* cases were relied on. The contention was rejected by the Board, (p. 352 A.C. and p. 311 W.W.R.). In *Reference re Natural Products Marketing Act,* (2) accepted as the *locus classicus* on the "peace, order and good government" clause, Duff, C.J.C. at p. 425 pointed out that the *Aeronautics* case did not hold that the Dominion's jurisdiction over aeronautics came within the above clause. In making this submission the decision in *A.G. Ont.* v. *Canada Temperance Federation* (3) where a casual reference is made to the decisions in the *Aeronautics* and *Radio* cases, has not been overlooked. The legislation there under review was the Canada Temperance Act as re-enacted in 1924. The original 1878 Statute was considered by the Privy Council in *Russell* v. *The Queen,* (4) and upheld under the "peace, order and good government" clause as being legislation, the subject matter of which had attained national concern as affecting the body politic of the nation. The Canada Temperance Act survived on the pronouncement in the *Russell* case and its constitutional validity was not again challenged until the *Temperance Federation* case. While the *Russell* case has stood as the basis for Dominion competence in the temperance field, the reasoning behind the decision based on the "peace, order and good government" clause has undergone a marked change in subsequent judgments of the Board. The *Board of Commerce* case (5); *Snider's* case (6). The Temperance case cannot be considered as over-ruling the well established principles on the interpretation of the "peace, order and good government" clause. The present interpretation to

(1) [1937] A.C. 326; 1 W.W.R. 299.
(2) [1936] S.C.R. 398.
(3) [1946] A.C. 193.
(4) 7 A.C. 829.
(5) [1922] 1 A.C. 191.
(6) [1925] A.C. 396.

be placed on that clause still remains the pronouncement of Lord Atkin previously referred to in *A.G. Can.* v. *A.G. Ont.* at pp. 352-3. The law on that matter as pronounced by Duff C.J. and adopted by Lord Atkin is to be found in the *Marketing Act* case (1) that, except in those instances where the subject matter of legislation has under extraordinary circumstances acquired aspects of such paramount significance as to take it into the national field, the "peace, order and good government" clause can have no application in a field assigned exclusively to the Province under s. 92. The clause can usurp the provincial field only where the subject matter is one of paramount national importance or in case of emergency. Lord Atkin's pronouncement was adopted and reaffirmed as late as 1949 in *C.P.R.* v. *A.G. of B.C.* (2).

The effect of the decision in the *Aeronautics* case is to give to the Dominion an overriding power to enact such legislation as may be necessary to fulfill an obligation under the Aerial Navigation Treaty and hence to encroach on the Provincial Legislative field for such purpose. The grounds of the decision having been reduced to this single proposition it can no longer be taken to have overruled the judgment of the Supreme Court (3) insofar as the judges of that Court may have assigned legislative jurisdiction to the Dominion or to the Provinces.

The Dominion's power to license and regulate airports cannot be supported as incidental or ancillary to any of the enumerated heads of s. 91 of the B.N.A. Act. *Montreal* v. *Montreal Street Railway* (4); *L'Union St. Jacques de Montreal* v. *Belisle* (5). Even assuming that licensing and regulation of commercial airports is incidental or ancillary to the legislative power of the Dominion under s. 132; as licensing and regulation of airports, particularly with respect to location, clearly falls within s. 92 the double aspect rule will apply and unless the Dominion has occupied the field, provincial legislation is competent. *A.G. Ont.* v. *A.G. Can.* (6); *Forbes* v. *A.G. Man.* (7). Under s. 4 of the *Aeronautics Act* regulations have been passed relating to airports, (See Part II of Air Regulations 1948), but the

(1) [1936] S.C.R. 398 at 414-26.
(2) [1950] A.C. 122; 1 W.W.R. 220.
(3) [1930] S.C.R. 663.
(4) [1912] A.C. 333 at 344.
(5) [1874] 6 L.R.P.C. 31 at 37.
(6) [1896] A.C. 348 at 366.
(7) [1937] A.C. 260 at 273-4.

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Dominion has not occupied the field in so far as location of airports is concerned and in so far as it has dealt with licensing and regulation of airports, it has not exceeded the limited power referred to by Duff J. in his judgment in [1930] S.C.R. 663 at 690. The licensing and regulatory provisions of the Regulations are merely to enforce compliance with those regulations which have been enacted to carry out treaty obligations and are not an occupation of the whole field to the exclusion of the Province.

S. 921 of *The Municipal Act* which deals with location does not clash with Dominion legislation in respect to licensing and regulation. It has not been superseded by Dominion legislation and is therefore valid and existing legislation under the Province's licensing powers contained in s. 92(9), raising revenue, and as ancillary to its legislative powers under s. 92 (13), property and civil rights, and 92(16), matters of local interest. *Hodge* v. *The Queen* (1); *R.* v. *Cherry* (2); *Shannon* v. *Lower Mainland Dairy Products Board* (3).

Assuming that the Dominion has jurisdiction over the subject of aeronautics generally by virtue of the "peace, order and good government" clause, the Province is not precluded from enacting s. 921, since in pith and substance it is nothing more than a zoning regulation, within the legislative competence of the Province under 92(13), property and civil rights, or 92(16), matters of local or private nature.

Under the "peace, order and good government" clause the Dominion derives legislative power under two propositions: 1. That matter is not within any of the enumerated heads of s. 92; or 2. That the matter has attained such paramount national importance as to affect the body politic of the nation. Leaving aside the question of aeronautics generally and dealing only with the subject matter of s. 921, what is there dealt with is directly within 92(13) or (16) and the Dominion could therefore acquire no authority under the first proposition. Dealing with the second proposition, jurisdiction under it can arise only when Parliament has legislated on a matter and thus by inference indicated that it has acquired such proportions as to be of paramount

(1) [1883] 9 A.C. 117 at 130-1. (2) [1938] 1 W.W.R. 12 at 16-18.
(3) [1938] A.C. 708 at 721.

national importance. Therefore, where there is no Dominion legislation and the matter is otherwise within s. 92, provincial legislation must be *intra vires*. *McLean* v. *Pettigrew* (1), per Taschereau J. at 79.

That a particular operation is subject to Dominion control does not mean that it is never subject to provincial legislation. Both may legislate on the same subject matter in different aspects and so long as there is no clash both may stand side by side. *Hodge* v. *The Queen* (2); *Reg.* v. *Wason* (3); *G.T.R.* v. *A.G. Can.* (4); *R.* v. *Magid* (5).

S. 921 of *The Municipal Act* is legislation which in pith and substance is zoning regulation and hence a local matter dealing with property and civil rights. It is not in pith and substance legislation on aerial navigation.

W. P. Fillmore, K.C. for the Respondent. The respondent relies upon the judgment of the trial judge and the majority judgments in the Court of Appeal. There is nothing in the *Aeronautics Act* or in the Regulations, or in the Convention discussed in the *Aeronautics* case, which either expressly or by necessary implication takes away or restricts the right of the Province to authorize a local body to pass by-laws relating to health or safety or any other matter of a local or private nature which is a proper subject of municipal by-law. Encroachment on provincial rights in this case cannot be justified as a measure of peace, order or good government in Canada or otherwise.

The Minister may exercise the widest control over aerial navigation and the licensing, inspection and regulation of aerodromes consistently with the right of the Province to designate where they may or may not be located. In any event until the Dominion invades this field a Province may continue to do so. It cannot be assumed by the Court that a municipality would pass by-laws in bad faith or with an ulterior motive. *A.G. for Ont.* v. *A.G. for Can.* (6); *City of Montreal* v. *Beauvais* (7); *Stengel* v. *Crandon et al* (8), (Florida S.C. 1945), annotation at p. 1232.

The questions involved in this appeal are to a certain extent academic in that the appellants had not obtained a license from the Minister, and the Minister might not

(1) [1945] 2 D.L.R. 65.
(2) (1883) 9 A.C. 117 at 130-1.
(3) (1890) 17 O.A.R. 221 at 240-1.
(4) [1907] A.C. 65 at 68.
(5) (1936) 43 M.R. 563 at 579-80.
(6) [1912] A.C. 571.
(7) 42 Can. S.C.R. 211.
(8) 161 A.L.R. 1228.

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grant a license where the aerodrome is located in defiance of local by-laws. The *Aeronautics Act* does not purport to give any person or company the right to locate an airport in breach of local by-laws. Assuming that the Dominion has ample power in this regard, it has not exercised the power. In the case of railways the *Railway Act* gives the railway power, subject to the approval of the Board of Transport Commissioners, to locate the line of a railway and to expropriate property. In *City of Toronto* v. *Bell Telephone Co.* (1), it was held that the scope of the respondent's business contemplated by the Act involved its extension beyond the limits of any one province, and was therefore within the express exception made by s. 92(10) (*a*) of the B.N.A. Act from the class of local works and undertakings assigned thereby to provincial legislatures. It is obvious from the facts here that the aerodrome contemplated by the appellants is designed and is only suitable for operations of a very local and private nature.

As the constitutional problems and cases are carefully reviewed in the appeal of the A.G. for Manitoba the respondent will not cover that ground.

The Dominion has not invaded, and cannot, and need not, invade the whole field: *The Provincial Secretary* v. *Egan* (2); *Reference re Validity of s. 31 of the (Alta.) Municipal District Act Amendment Act, 1941* (3). There is nothing in the *Aeronautics Act* or the Regulations which intereferes with provincial jurisdiction over property and civil rights or matters of a local or private nature in the province. The right of the Province to legislate in respect of zoning regulations is also an exercise of the right of control over municipal institutions in the province. *Ladore* v. *Bennett* (4); *The King* v. *Eastern Terminal Elevator Co.* (5); *Reference re Dairy Industries Act* (6).

Varcoe K.C. and *Keith K.C.* replied.

THE CHIEF JUSTICE—Notwithstanding that the International Convention under consideration in the *Aeronautics* case (7), was denounced by the Government of Canada

(1) [1905] A.C. 52.
(2) [1941] S.C.R. 396.
(3) [1943] S.C.R. 295.
(4) [1939] A.C. 468 at 482.
(5) [1925] S.C.R. 434.
(6) [1949] S.C.R. 1.
(7) [1932] A.C. 54.

as of April 4, 1947, I entertain no doubt that the decision of the Judicial Committee is in its pith and substance that the whole field of aerial transportation comes under the jurisdiction of the Dominion Parliament. In the language of their Lordships at p. 77:—

> Aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

In those circumstances it would not matter that Parliament may not have occupied the field. But, moreover, the convention on International Civil Aviation, signed at Chicago on December 7, 1944, has since become effective; and what was said in the *Radio Reference* (1) by Viscount Dunedin at p. 313, applies here. Although the convention might not be looked upon as a treaty under s. 132 of the British North America Act, "it comes to the same thing".

I fail however to see how it can be argued that the Dominion Parliament has not occupied the field. The *Aeronautics Act*, R.S.C. 1927, c. 3, as amended by c. 28 of the Statutes of 1944-45, c. 9 of the Statutes of 1945, and c. 23 of the statutes of 1950, makes it the duty of the Minister "to supervise all matters connected with aeronautics * * * to prescribe aerial routes * * * to prepare such regulations as may be considered necessary for the control or operation of aeronautics in Canada * * * and for the control or operation of aircraft registered in Canada wherever such aircraft may be * * * for the licensing of navigation and the regulation of all aerodromes and airstations, etc."

Such regulations have been passed under the authority of the *Aeronautics Act* by P.C. 2129, part of which deals with the subject matter of airports and provides for the issuing of licenses by the Minister. In the circumstances, the Dominion legislation occupies the field, or at least so much of it as would eliminate any provincial legislation, and, more particularly, that here in question.

I think, therefore, that the provincial legislation under discussion is *ultra vires* and the by-law adopted by the respondent, the Rural Municipality of West St. Paul, falls with it.

(1) [1932] A.C. 304.

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The appeal, therefore, should be allowed with costs in this Court against the respondent, but without costs to either intervenant. As the parties had agreed that there would be no costs awarded in the Courts below, this agreement, of course, should stand.

KERWIN J.:—This is an appeal by Mr. and Mrs. Johannesson against a judgment of the Court of Appeal for Manitoba affirming an order of Campbell J. dismissing their application for an order declaring that s. 921 of *The Municipal Act,* R.S.M. 1940, c. 141, was *ultra vires* as not being within the legislative competence of the Legislature, and that by-law 292 of the rural municipality of West St. Paul, passed May 27, 1948, in pursuance of such section, was, therefore, null and void.

Section 921 of *The Municipal Act* appears in Division II "Public Safety and Amenity" under the sub-head "Aerodromes" and reads as follows:

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

This section first appeared in 1920, being enacted by s. 18 of c. 82 of the statutes of that year as paragraph (*y*) of s. 612 of *The Municipal Act,* R.S.M. 1913, c. 133. That s. 612 was one of a group of sections appearing in Part IX of the Act "Legislative Powers of Councils", under the sub-head "Various Trades and Occupations." It next appeared in s. 97 of the Consolidated Amendments to the Municipal Act, 1924, and then, in 1933, as s. 910 in Division II of *The Municipal Act,* 1933, c. 57, "Public Safety and Amenity" under the sub-head "Aerodromes" the same relevant position that the present s. 921 now occupies.

The enacting parts of By-law No. 292 of the rural municipality of West St. Paul provide:

> 1. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued within that part of The Rural Municipality of West St. Paul, in Manitoba, bounded as follows: All those portions of River Lots One (1) to Thirty-three (33) both inclusive, of the Parish of Saint Paul, in Manitoba, according to a plan of same registered in the Winnipeg Land Titles Office as No. 3992, which lie to the East of the Eastern Limit of the Main Highway as said Highway is shewn on said Plan No. 3992.

2. No aerodrome or place where aeroplanes are kept for hire or gain shall be erected or maintained or continued in any other part of the said Rural Municipality of West St. Paul, unless and until a license therefor shall first have been obtained from the said Municipality.

3. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in that part of The Rural Municipality of West St. Paul in Manitoba described in paragraph One (1) hereof.

4. No building or installation of any machine shop for the testing and/or repairing of air-craft shall be erected or maintained or continued in any other part of the said Municipality unless and until a license therefor shall first have been obtained from the said Municipality.

Section 921 of *The Municipal Act* does not confer powers to provide generally for zoning, or for building restrictions; the powers are specifically allotted with reference to "aerodromes or any places where aeroplanes are kept for hire or gain." The by-law follows the section so that, if the latter is *ultra vires* the Provincial Legislature, the former cannot be upheld.

The circumstances which give rise to the present dispute are important as showing the far-reaching effect of the provisions of the section. The appellant Johannesson had been engaged in commercial aviation since 1928 and held an air transport licence, issued by the Air Transport Board of Canada, to operate an air service at Winnipeg and Flin Flon. The charter service which he operated under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and had substantially increased in volume over the years. This service was operated with light and medium weight planes, which in the main were equipped in summer with floats and in winter with skis in order to permt landing on the numerous lakes and rivers in this territory, and these planes had to be repaired and serviced in Winnipeg, which was the only place within the territory where the necessary supplies and any facilities were available for that purpose. The use by small planes of a large airfield, such as Stevenson Airport near Winnipeg which was maintained for the use of large transcontinental airplanes, was impractical and would eventually be prohibited. No facilities existed on the Red River in Winnipeg for the repairing and servicing of planes equipped with floats, and repairs could only be made to such planes by dismantling them at some private dock and transporting them, by truck, through Winnipeg to Stevenson Airport.

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After a long search by Johannesson in the suburbs of Winnipeg for a site that would combine an area of level land of sufficient area and dimensions and location to comply with the regulations of the Civil Aviation Branch of the Canadian Department of Transport relating to a licensed air strip with access to a straight stretch of the Red River of sufficient length to be suitable for the landing of airplanes equipped with floats, he found such a location (but one only) in the rural municipality of West St. Paul and acquired an option to purchase it but, before the transaction was completed By-law 292 was passed. Title to the land was subsequently taken in the name of both appellants and these proceedings ensued. The Attorney General of Canada and the Attorney General of Manitoba were notified but only the latter was represented before the judge of first instance and the Court of Appeal. Leave to appeal to this Court was granted by the latter.

On behalf of the appellants and the Attorney General of Canada, reliance is placed upon the decision of the Judicial Committee in the *Aeronautics* case (1). Irrespective of later judicial comments upon this case, in my view it is a decision based entirely upon the fact that the Dominion Aeronautics Act there in question had been enacted pursuant to an International Convention of 1919 to which the British Empire was a party and, therefore, within s. 132 of the British North America Act, 1867:

> 132. The Parliament and Government of Canada shall have all Powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries.

However, in the subsequent decision in the *Labour Conventions* case (*A.G. for Canada* v. *A.G. for Ontario* (2)), Lord Atkin, who had been a member of the Board in the *Aeronautics* case, said with reference to the judgment therein:

> The *Aeronautics case* (3) concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries. Sect. 132, therefore, clearly applied, and but for a remark at the end of the judgment, which in view of the stated ground of the decision was clearly obiter, the case could not be said to be an authority on the matter now under discussion.

(1) [1932] A.C. 54. (2) [1937] A.C. 326.
(3) [1932] A.C. 54 at 351.

The remarks of Viscount Simon in *A.G. for Ontario* v. *Canada Temperance Federation* (1), must be read when considering the words of Lord Sankey in the *Aeronautics* case in another connection. At the moment all I am concerned with emphasizing is that the *Aeronautics* case decided one thing, and one thing only, and that is that the matter there discussed fell within the ambit of s. 132 of the British North America Act.

At this stage it is necessary to refer to a matter that was not explained to the Courts below. According to a certificate from the Under-Secretary of State for Foreign Affairs, the Convention of 1919 was denounced by Canada, which denunciation became effective in 1947. This was done because on February 13, 1947, Canada had deposited its Instrument of Ratification of the Convention on International Civil Aviation signed at Chicago December 8, 1944, and which Convention came into force on April 4, 1947. With the exception of certain amendments that are not relevant to the present discussion, the *Aeronautics Act* remains on the statute books of Canada in the same terms as those considered by the Judicial Committee in the *Aeronautics* case. Section 132 of the B.N.A. Act, therefore ceased to have any efficacy to permit Parliament to legislate upon the subject of aeronautics.

Nevertheless the fact remains that the Convention of 1919 was a treaty between the Empire and foreign countries and that pursuant thereto the *Aeronautics Act* was enacted. It continues as c. 3 of the Revised Statutes of Canada, 1927, as amended. Under s. 4 of that Act, as it stood when these proceedings were commenced, the Minister, with the approval of the Governor in Council, had power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular but not to restrict the generality of the foregoing, he might make regulations with respect to * * * (*c*) the licensing, inspection and regulation of all aerodromes and air stations. Pursuant thereto regulations have been promulgated dealing with many of the matters mentioned in the section, including provisions for the licensing of air ports. If, therefore, the subject of aeronautics goes beyond local or provincial concern because it has attained such dimensions as to affect the body politic

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of Canada, it falls under the "Peace, Order and Good Government" clause of s. 91 of the B.N.A. Act since aeronautics is not a subject-matter confined to the provinces by s. 92. It does not fall within head 8, "Municipal Institutions", as that head "simply gives the provincial legislature the right to create a legal body for the management of municipal affairs * * * The extent and nature of the functions" the provincial legislature "can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of s. 92 other than No. 8": *Attorney General for Ontario* v. *Attorney General for Canada* (1). Nor, on the authority of the same decision is it within head 9: "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes." Once it is held that the subject-matter transcends "Property and Civil Rights in the Province" (head 13) or "Generally all matters of a merely local or private nature in the Province" (head 16), these two heads of s. 92 have no relevancy.

Now, even at the date of the *Aeronautics* case, the Judicial Committee was influenced (i.e. in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions. That that is so at the present time is shown by the terms of the Chicago Convention of 1944 and the provisions of the Dominion Aeronautics Act and the regulations thereunder referred to above. The affidavit of the appellant Johannesson, from which the statement of facts was culled, also shows the importance that the subject of air navigation has attained in Canada. To all of which may be added those matters of everyday knowledge of which the Court must be taken to be aware.

It is with reference to this phase of the matter that Viscount Simon's remarks in *A.G. for Canada* v. *Canada Temperance Federation* (2), must be read. What was there under consideration was the Canada Temperance Act, originally enacted in 1878, and Viscount Simon stated: "In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such

(1) [1896] A.C. 348 at 364. (2) [1946] A.C. 193 at 205.

that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (1) and the *Radio* case (2), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures." This statement is significant because, while not stating that the *Aeronautics* case was a decision on the point, it is a confirmation of the fact that the Board in the *Aeronautics* case considered that the subject of aeronautics transcended provincial legislative boundaries.

The appeal should be allowed, the orders below set aside, and judgment should be entered declaring s. 921 of the Act *ultra vires* and By-law 292 of the rural municipality of West St. Paul null and void. By agreement there are to be no costs in the Courts below but the appellants are entitled to their costs in this Court against the municipality. There should be no order as to costs for or against either intervenant.

The judgment of Kellock and Cartwright, JJ. was delivered by:

KELLOCK J.:—The question in this appeal is as to the constitutional validity of the following section of *The Municipal Act,* R.S.M. 1940, c. 141, namely,

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain definite areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

Purporting to act under this legislation, the respondent municipality enacted a by-law prohibiting aerodromes in a defined area in the municipality and permitting aerodromes elsewhere in the municipality only upon license. The appellant, who holds an air transport license issued by the Air Transport Board of Canada to operate an air service at both the City of Winnipeg and the town of Flin Flon, has been operating a charter aeroplane service in Manitoba and Saskatchewan for some years, using mainly float and ski planes. For the purposes of his business, the appellant acquired an area in the respondent municipality having

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access to a stretch of the Red River. These premises were acquired having in view the requirements of the Department of Transport with respect to aerodromes, and it was subsequent to the appellant's acquisition that the by-law in question was passed. The appellant's motion for an order declaring the above legislation and by-law *ultra vires* was dismissed by the judge of first instance, and this order was affirmed by the Court of Appeal, Coyne J. A. dissenting.

In this court, we were informed on behalf of the Attorney General of Canada that the convention under consideration in the *Aeronautics* case (1), was denounced by the Government of Canada as of April 4, 1947, on which date also the convention on International Civil Aviation, signed at Chicago on December 7, 1944, became effective. Insofar, therefore, as the above decision depends for efficacy upon s. 132 of the British North America Act, that foundation has ceased to exist.

In the *Aeronautics* case, the Privy Council held that the "whole field of legislation in regard to aerial navigation belongs to the Dominion" by virtue of s. 132, s. 91 heads 2, 5 and 7, and the residuary power in s. 91 to make laws for the peace, order and good government of Canada. Their Lordships expressed the view also, at p. 73, that aeronautics was not a class of subject within property and civil rights, and at p. 77, that it was not a subject vested by specific words in the provinces. On the latter page, their Lordships went on to say:

> Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

It is true, as the judgment itself shows, and as later pronouncements of the judicial committee have repeated, that s. 132 was the leading consideration in the judgment. In the *Radio Reference* (2), the convention there in question was not one to which s. 132 was applicable, but, as pointed out by Lord Atkin in 1937 A.C. at p. 351, that convention dealt with classes of matters which did not fall within s. 92 but entirely within subject matters of Dominion jurisdiction under s. 91. In these circumstances, their Lordships said in the *Radio* case that, although the convention there in

(1) [1932] A.C. 54. (2) [1932] A.C. 304.

question was not such a treaty as fell within s. 132, it came to the same thing. At p. 313 Viscount Dunedin said:

> The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the convention; and to prevent individuals in Canada infringing the stipulations of the convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.

To the extent, therefore, to which the subject matter of the Chicago convention of 1944 falls within s. 91, the language of Viscount Dunedin is equally apt. In my opinion, that subject matter is exclusively within Dominion jurisdiction.

In my opinion, the subject of aerial navigation in Canada is a matter of national interest and importance, and was so held in 1932. In the *Canada Temperance Federation* case (1), Viscount Simon said at p. 205:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (2) and the *Radio* case (3)), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

This statement is a recognition of the situation which is well known and understood in this country. It was quite frankly and quite properly admitted by Mr. Fillmore for the respondent, whose argument was merely that the Dominion had not in fact legislated in the field of s. 921 of the provincial statute.

It is no doubt true that legislation of the character involved in the provincial legislation regarded from the standpoint of the use of property is normally legislation as to civil rights, but use of property for the purposes of an aerodrome, or the prohibition of such use cannot, in my opinion, be divorced from the subject matter of aeronautics or aerial navigation as a whole. If that be so, it can make no difference from the standpoint of a basis for legislative jurisdiction on the part of the province that Parliament may not have occupied the field.

Once the decision is made that a matter is of national interest and importance, so as to fall within the peace,

(1) [1946] A.C. 193. (2) [1932] A.C. 54.
(3) [1932] A.C. 304.

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order and good government clause, the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive. If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that such matters no longer come within the classes of subject assigned to the provinces. I think, therefore, that as the matters attempted to be dealt with by the provincial legislation here in question are matters inseparable from the field of aerial navigation, the exclusive jurisdiction of Parliament extends thereto. The non-severability of the subject matter of "aerial navigation" is well illustrated by the existing Dominion legislation referred to below, and this legislation equally demonstrates that there is no room for the operation of the particular provincial legislation in any local or provincial sense.

The *Aeronautics Act*, R.S.C. 1927, c. 3, as amended by c. 28 of the statutes of 1944-45, c. 9 of the statutes of 1945, and c. 23 of the statutes of 1950, provides in part as follows:

3. It shall be the duty of the Minister

(*a*) to supervise all matters connected with aeronautics.

* * *

(*f*) to prescribe aerial routes.

* * *

(1) to consider, draft and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada and for the control or operation of aircraft registered in Canada wherever such aircraft may be.

* * *

4. (1) Subject to the approval of the Governor in Council, the Minister may make regulations to control and regulate air navigation over Canada and the territorial waters of Canada and the conditions under which aircraft registered in Canada may be operated over the high seas or any territory not within Canada, and, without restricting the generality of the foregoing, may make regulations with respect to

* * *

(*c*) licensing, inspection and regulation of all aerodromes and air-stations.

(*d*) the conditions under which aircraft may be used or operated.

(*e*) the conditions under which goods, mails and passengers may be transported in aircraft and under which any act may be performed in or from aircraft or under which aircraft may be employed.

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified.

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft.

(*h*) aerial routes, their use and control.

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada and of aircraft registered in Canada wherever such aircraft may be.

* * *

(3) Every person who violates the provisions of a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding five thousand dollars, or to imprisonment for a term not exceeding one year or to both fine and imprisonment.

(4) Every person who violates an order or direction of the Minister made under a regulation is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both fine and imprisonment.

12. (1) Subject to the approval of the Minister, the Board may issue to any person applying therefor a license to operate a commercial air service.

* * *

(5) In issuing any license the Board may prescribe the routes which may be followed or the areas to be served and may attach to the license such conditions as the Board may consider necessary or desirable in the public interest, and, without limiting the generality of the foregoing, the Board may impose conditions respecting schedules, places of call, carriage of passengers and freight, insurance, and subject to the *Post Office Act*, the carriage of mail.

* * *

15. (1) No person shall operate a commercial air service unless he holds a valid and subsisting license issued under section twelve.

Regulations were passed under the authority of the above statute by P.C. 2129 of May 11, 1948. Part III deals with the subject matter of "airports." The following paragraphs are pertinent:

1. No area of land or water shall be used as an airport unless it has been licensed as herein provided.

2. Licenses to airports may be issued by the Minister and may be made subject to such conditions respecting the aircraft which may make use of the airport, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Minister may direct.

4. The license of an airport may be suspended or cancelled by the Minister at any time for cause and shall cease to be valid two weeks after any change in the ownership of the airport, unless sooner renewed to the new owner.

5. Every licensed airport shall be marked by day and by night as may be from time to time directed by the Minister.

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7. (1) No person shall without authority of the Minister—

(*a*) mark any unlicensed surface or place with any mark or display any signal calculated or likely to induce any person to believe that such surface or place is a licensed airport;

(*b*) knowingly use or permit the use of an airport for any purpose other than those for which it has been licensed.

(2) The onus of proving the existence of any authority or license shall be upon the person charged.

8. No water-craft shall cross or go upon that part of the water area forming part of any airport which it is necessary to keep clear of obstruction in order that aircraft may take off and alight in safety, having regard to the wind and weather conditions at the time, and every person in charge of a water-craft is guilty of a breach of these regulations if such craft crosses or goes upon such area after reasonable warning by signal or otherwise.

9. There shall be kept at every licensed airport a register in which there shall be entered immediately after the alighting or taking off of an aircraft a record showing the nationality and registration marks of such aircraft, the name of the pilot, the hour of such alighting or taking off, the last point of call before such alighting and the intended destination of the aircraft.

10. (1) Every licensed airport, and all aircraft and goods therein shall be open to the inspection of any customs officer, immigration officer, officer or person holding or named in any Writ of Assistance or any officer of or other person authorized by the Minister, but no building used exclusively for purposes relating to the construction of aircraft or aircraft equipment shall be subject to inspection except upon the written order of the Minister.

(2) All state aircraft shall have at all reasonable times, the right of access to any licensed airport, subject to the conditions of the license.

In my opinion, just as it is impossible to separate intra-provincial flying from inter-provincial flying, the location and regulation of airports cannot be identified with either or separated from aerial navigation as a whole. The provincial legislation here in question must be held, therefore, to be *ultra vires*, and the by-law falls with it.

The appeal should therefore be allowed. By agreement, no costs were asked or awarded in the courts below. I think, however, that the appellant should have his costs in this court as against the respondent, but that there should be no other costs.

The judgment of Taschereau and Estey, JJ. was delivered by:—

ESTEY J.:—The appellants submit that s. 921 of the Municipal Act (R.S.M. 1940, c. 141) is legislation in relation to aeronautics and, therefore, beyond the competency of the Legislature of Manitoba to enact.

> 921. Any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuance of aerodromes or places where aeroplanes are kept for hire or gain.

The facts out of which this issue arises are as follows:

The appellant, Konrad Johannesson, has been engaged in commercial aviation in northern Manitoba and Saskatchewan since 1928. He desired an airport at Winnipeg and on September 27, 1947, obtained an option upon, and on April 20, 1948, purchased a portion of River Lot 33 Pl. 3992 in the respondent municipality for the purpose of equipping and maintaining it as an aerodrome.

The respondent municipality, under date of May 27, 1948, passed By-law No. 292, by virtue of the foregoing s. 921. The effect of this by-law may be briefly expressed: (*a*) As to lots 1 to 33, Pl. 3992, in the respondent municipality, the erection or maintenance of any aerodrome or machine shop for testing or repairing aircraft is entirely prohibited; (*b*) in the remaining portion neither of the foregoing may be erected or maintained without a licence from the respondent municipality.

The appellants, on October 22, 1948, asked the Court to declare s. 921 *ultra vires* of the Legislature of Manitoba and the enactment of By-law 292 by the respondent municipality a nullity.

Mr. Justice Campbell held that the Provincial Legislature had jurisdiction to enact s. 921 and that the by-law was valid. His judgment was affirmed by a majority of the Court of Appeal in Manitoba, Mr. Justice Coyne dissenting.

The Attorneys-General for Manitoba and the Dominion (the latter for the first time in this Court) have intervened and contended respectively that the Province has and has not competent authority to enact s. 921.

The judgments in the Court below proceed upon the basis that the Aeronautics Convention in Paris, ratified on behalf of the British Empire on June 1, 1922, was still

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in effect. Mr. Varcoe, on behalf of the Attorney General of Canada, however, informed the Court that this convention had been abrogated by the Civil Aviation Convention in Chicago in 1944, and became binding on Canada on April 4, 1947. This is important as the Chicago Convention, unlike the Paris Convention, is signed by Canada in her own right and, therefore, s. 132 of the British North America Act has no application in determining the jurisdiction of the Parliament of Canada and the Provincial Legislatures in relation thereto. *Radio* case (1); *Labour Convention* case (2). This does not, however, mean that the *Aeronautics* case (3), is of no importance in a consideration of the present issue. In that case the Judicial Committee considered three questions:

(1) Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the convention entitled "Convention relating to the Regulation of Aerial Navigation?"

(3) Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of s. 4 of the *Aeronautics Act*, c. 3, R.S.C. 1927?

(4) Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting: * * * (*c*) the licensing, inspection and regulation of all aerodromes and air stations?

The Paris Convention, drawn up at the Peace Conference in Paris and dated October, 1919, was ratified by His Majesty on behalf of the British Empire June 1, 1922. Canada already had enacted in 1919 the Air Board Act (S. of C. 1919, c. 11, 1st Session), amended it in 1922 (S. of C. 1922, c. 34) and styled it the "Aeronautics Act" (R.S.C. 1927, c. 3). It will be observed that the Air Board Act was enacted in the same year that the Paris Convention was drawn up, no doubt with the convention in mind, but the latter is not mentioned and the comprehensive language of the statute deals with aeronautics in all its phases. This is evident from the following provisions:

3. It shall be the duty of the Air Board—

(*a*) to supervise all matters connected with aeronautics;

* * *

(*f*) to prescribe aerial routes;

* * *

(1) [1932] A.C. 304; Plaxton 137. (2) [1937] A.C. 326; Plaxton 278.
(3) [1932] A.C. 54; Plaxton 93.

(*k*) to investigate, examine and report on all proposals for the institution of commercial air services within or partly within Canada or the limits of the territorial waters of Canada;

(*l*) to consider, draft, and prepare for approval by the Governor in Council such regulations as may be considered necessary for the control or operation of aeronautics in Canada or within the limits of the territorial waters of Canada; and,

(*m*) to perform such other duties as the Governor in Council may from time to time impose.

It was this legislation that the Privy Council had before it in the *Aeronautics* case. Moreover, it should be noted that while question (1), as submitted by the Governor in Council, dealt with the legislative jurisdiction of Canada in relation to the Paris Convention, questions (3) and (4) concerned the legislative jurisdiction of the Parliament of Canada to enact s. 4 of the Aeronautics Act and the regulations thereunder without regard to the Convention.

In the course of the judgment itself their Lordships sated at p. 64:

> The determination of these questions depends upon the true construction of ss. 91, 92 and 132 of the British North America Act.

Their Lordships suggest that it may come under s. 91(2), (5) and (9), but expressly state that it does not come under (10) (Navigation and Shipping). They also point out that it does not come under Property and Civil Rights (92 (13)) and then state:

> * * * transport as a subject is dealt with in certain branches both of s. 91 and of s. 92, but neither of these sections deals specially with that branch of transport which is concerned with aeronautics.

Then, after discussing s. 132, they conclude:

> To sum up, having regard (*a*) to the terms of s. 132; (*b*) to the terms of the Convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of s. 91, items 2, 5 and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order, and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.

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Their Lordships, apart from s. 132, and in support of their answers to questions (3) and (4), were of the opinion that legislation in relation to aeronautics was within the competence of the Parliament of Canada. The remark of Viscount Dunedin, in the *Radio* case *supra,* (at 311) that

> the leading consideration in the judgment of the Board was that the subject fell within the provisions of s. 132 of the British North America Act, 1867,

and that of Lord Atkin in the Labour Convention case *supra* (at 351) that

> The *Aeronautics* case concerned legislation to perform obligations imposed by a treaty between the Empire and foreign countries,

particularly when read in relation to their context, do not detract from the foregoing, while the observations of Viscount Simon in the *Canada Temperance Federation* case (1), would appear to support the foregoing view when, at p. 205, he states:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case and the *Radio* case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

The Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive jurisdiction of the Dominion, it follows that the province cannot legislate in relation thereto, whether the precise subject matter of the provincial legislation has, or has not already been covered by the Dominion legislation.

It is then submitted that if aeronautics is within the legislative competence of the Parliament of Canada, including the power to license and regulate aerodromes, it would not include the location and continuation of aerodromes, which would be a provincial matter under Property and Civil Rights. With great respect, it would appear that such a view attributes a narrower and more technical meaning to the word "aeronautics" than that which has been attributed to it generally in law and by those interested in

(1) [1946] A.C. 193.

the subject. Indeed, the definition adopted by Mr. Justice Dysart, as he found it in Corpus Juris, 2 C.J.S. 900,

> The flight and period of flight from the time the machine clears the earth to the time it returns successfully to the earth and is resting securely on the ground,

contemplates the operation of the aeroplane from the moment it leaves the earth until it again returns thereto. This, it seems, in itself makes the aerodrome, as the place of taking off and landing, an essential part of aeronautics and aerial navigation. This view finds support in the fact that legislation in relation to aeronautics and aerial navigation, not only in Canada, but also in Great Britain and the United States, deals with aerodromes, as well as the conventions above mentioned. Indeed, in any practical consideration it is impossible to separate the flying in the air from the taking off and landing on the ground and it is, therefore, wholly impractical, particularly when considering the matter of jurisdiction, to treat them as independent one from the other.

The submission that in the granting of the licence the sufficiency of the location will always be considered and might even be the controlling factor in the granting or refusing of a licence, in so far as it may be of assistance, emphasizes the importance of the location of the aerodrome and of the essential part the aerodrome plays in any scheme of aeronautics. Legislation which in pith and substance is in relation to the aerodrome is legislation in relation to the larger subject of aeronautics and is, therefore, beyond the competence of the Provincial Legislatures.

It is submitted that s. 921 is zoning legislation, as that term is now understood in municipal legislation. The general provisions for the enactment of zoning by-laws are contained in ss. 904, 905 and 906 of this statute. As notwithstanding this general provision such legislation may be enacted under other sections, it is necessary to determine the nature and character of the provisions of s. 921. The foregoing ss. 904, 905 and 906 are typical of legislation authorizing zoning by-laws. The end and purpose of zoning legislation, as the name indicates, is to authorize the municipality to pass by-laws in respect of certain areas and make those areas subject to prohibitions and restrictions designed to provide uniformity within those particular

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areas. The Legislature, in enacting s. 921, provided that, without regard to the nature and character or the use and purpose made of the area, the municipality may prohibit entirely, or permit only under a licence issued by it, an aerodrome within certain areas. Such legislation is in pith and substance in relation to aerodromes and, therefore, in relation to aeronautics rather than to zoning.

The appeal should be allowed with costs to the appellants, Konrad Johannesson and Holmfridur M. E. Johannesson, against the respondent municipality.

LOCKE J.:—The proceedings in this matter were initiated by notice of a motion to be made in the Court of King's Bench for an order declaring s. 921 of *The Municipal Act* (R.S.M., 1940, c. 141) to be *ultra vires* and the respondent municipality's by-law No. 292, enacted in part under the authority of that section, to be of no effect. On the hearing before Campbell J., the Attorney-General for Manitoba appeared and supported the position for the municipality and the application was dismissed.

Section 921 provides that any municipal corporation may pass by-laws for licensing, regulating, and, within certain defined areas, preventing the erection, maintenance and continuation of aerodromes or places where airplanes are kept for hire or gain. The terms of the by-law are quoted verbatim in other judgments delivered in this matter and need not be repeated.

On the appeal, Dysart, J.A. considered that s. 921 in so far as it authorizes a municipal corporation to prohibit the erection, within a described area, of an aerodrome intended for other than Dominion Government use, was *intra vires* and that the by-law was valid to that extent. He decided also that the requirement that a licence (in the sense of a building permit) should be obtained was within provincial powers and the by-law, accordingly, effective to this further extent. As to the remainder of the by-law, he considered it to be *ultra vires*.

Adamson J.A. was of the opinion that s. 921 of the Municipal Act would be within provincial powers if the words "licensing and regulating" and the words "continu-

ance and maintenance" were deleted. With these amendments, the section would read:

> Any municipal corporation may pass by-laws within certain defined areas preventing the erection of aerodromes or places where airplanes are kept for hire or gain.

As to the by-law, he considered paragraphs 1 and 3 to be *intra vires* if the words "and continued" were eliminated but that paragraphs 2 and 4 in their present form, were *ultra vires* as requiring a licence from the municipality to operate an aerodrome after location. He expressed the further view that if these paragraphs were amended to require merely a building permit prior to licensing by the Minister under the *Aeronautics Act,* they would be valid. Coyne J.A. dissented, considering s. 921 to be *ultra vires* the province. The formal certificate of the Registrar of the Court of Appeal says that the Chief Justice of Manitoba and the late Mr. Justice Richards concurred in the result. While two members of the Court thus considered both the section and the by-law to be in part *ultra vires,* since neither the learned Chief Justice nor the late Richards J.A. expressed their views on these matters, the appeal was dismissed *in toto.* In the result, both the section and the by-law have been found *intra vires* the province and the municipality respectively.

The material filed by the appellants on the motion shows that Konrad Johannesson, described as a flying service operator, has been engaged in commercial aviation since 1928 and holds a licence issued by the Air Transport Board of Canada to operate an air service at Winnipeg and Flin Flon: that the service which he operates under this licence covers territory in central and northern Manitoba and northern Saskatchewan, and is conducted with light and medium planes mainly equipped in summer with floats and, in the winter, with skis in order to permit landing on the numerous lakes and rivers in this territory and that these planes have to be repaired and serviced at Winnipeg, the only place within the territory where the necessary supplies and facilities are available for that purpose. It is said that there are no existing facilities on the Red River in Winnipeg for the repairing and servicing of planes equipped with floats and that repairs can only be made for such planes by dismantling them at some private dock and transporting them by trucks to the Stephenson Airport.

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According to Johannesson's affidavit, he searched the areas surrounding Winnipeg for an area of level land having access to a straight stretch of the Red River of a sufficient length for the landing of airplanes equipped with floats, which would comply with the regulations of the Civil Aviation Branch of the Department of Transport relating to a licensed air strip, and the only portion of land which he had found was that purchased by him and his wife in the rural municipality of West St. Paul. The material does not state, and it was apparently assumed, that the Court would take judicial notice of the fact that there is no body of water in the area between Emerson on the south and Selkirk on the north, other than the Red River, on which planes equipped for alighting on water could land or take off. The material further discloses that, due to the lack of suitable facilities for their servicing and repair, float-equipped planes from the United States and other provinces of Canada are by-passing Winnipeg.

The question to be determined is one of far-reaching importance. Johannesson apparently contemplated the establishment of an aerodrome, within the meaning of that term as defined by the Air Regulations hereinafter referred to, where light and medium weight planes not equipped with radio but with suitable equipment for alighting either upon land or water, could land and take off and where they could be repaired and otherwise furnished with service.

The control of aeronautics in Canada was first dealt with by statute by Parliament, by c. 11 of the Statutes of 1919. During the sittings of the Peace Conference in Paris at the close of the Great War, a convention relating to the regulation of aerial navigation was drawn up which was subsequently ratified by His Majesty on behalf of the British Empire and it was with a view to performing the obligations of Canada as part of the Empire under this convention, then in course of preparation, that the Air Board Act of 1919 was passed. That statute set up a board whose duties included that of supervising all matters connected with aeronautics, constructing and maintaining all government aerodromes and air stations, prescribing aerial routes, licensing and regulating all aerodromes and air stations and prescribing the areas within which aircraft coming from any places outside of Canada were to land.

By c. 34 of the Statutes of Canada 1922 the Act of 1919 was repealed and all the powers and functions vested by it in the Board were directed to be exercised by or under the direction of the Minister of National Defence. The duties and powers of the Minister were further defined by c. 3, R.S.C. 1927, and include duties similar to those of the Air Board under the Act of 1919. Under powers contained in the statute as originally enacted, Air Regulations dealing in detail with the control of aerial navigation were enacted, and the right of Parliament to sanction the making of certain of these regulations and the matter of the exclusive legislative and executive authority of Parliament to perform the obligations of Canada or of any province thereof under the convention and the matter of its legislative authority to enact, in whole or in part, the provisions of s. 4 of the *Aeronautics Act,* c. 3, R.S.C. 1927, were referred to this Court by the Governor-General in Council under s. 55 of the *Supreme Court Act.* An appeal was taken to the Judicial Committee from the answers made in this Court to the questions submitted. The judgment of the Board allowing the appeal found that exclusive legislative and executive authority for performing the obligations of Canada or of any province under the convention was in the Parliament of Canada, that s. 4 of the Act was *intra vires* and that it was within the power of Parliament to sanction the making and enforcement of the said Air Regulations (1932 A.C. 54).

We were informed upon the argument of this matter that the Convention, the terms of which were considered on the appeal to the Privy Council, had been denounced by Canada and a new International Convention entered into by this country with other States in the year 1944, by which substantially similar international obligations were assumed. This fact was not drawn to the attention of the Court of Appeal but, in my opinion, it does not affect the questions to be determined here. Apart from the fact that, as I understand the arguments addressed to us, it is not contended on behalf of any of the respondents that the *Aeronautics Act* is *ultra vires* the Parliament of Canada or that it was without authority to sanction the Air Regulations in force at the time of the commencement of this litigation, if, as was found by the Judicial Committee, it

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was within the legislative competence of Parliament to enact c. 3, R.S.C. 1927, it would not become invalid by this circumstance (*A.G. Ontario* v. *Canada Temperance Federation* (1).

Parliament had thus dealt generally with the matter of aeronautics when in the years following the Great War the Manitoba Legislature, by s. 18 of c. 82 of the Statutes of 1920 of Manitoba, passed an amendment to s. 612 of *The Municipal Act,* R.S.M. 1913, c. 133, assuming to empower municipal councils to make by-laws:

> for licensing, regulating and within certain defined areas, preventing the erection, maintenance and continuance of aerodromes and places where airplanes are kept for hire or gain.

With a slight change in the phraseology which does not affect the present matter, the present s. 921 of c. 141, R.S.M. 1940, is to this effect. Neither the word "aerdromes", as it was spelled in the statute of 1920, or the word "aerodromes" as it appears in the present statute, were defined. Neither word appears in the Oxford English Dictionary, but in the shorter Oxford Dictionary the word "aerodrome" is defined as:

> A course for the use of flying machines: a tract of level ground from which airplanes or airships can start.

In the Supplement to Murray's New English Dictionary issued in 1933 the word is defined as:

> A course for practice or contest with flying machines: a tract of level ground from which flying machines (airplanes or airships) can start.

The area within which the prohibition of the erection, or maintenance, or continuation of an aerodrome is contained in the by-law is the portions of river lots 1 to 33 lying to the east of the main highway running to the west of the Red River and includes property such as Johannesson's fronting upon the river. Whether in view of the decision in *Patton* v. *Pioneer Navigation & Sand Co.* (2), dealing with the rights of the owners of lands fronting upon the Assiniboia River, also a navigable non-tidal stream, it was intended by the by-law to prevent planes equipped with floats from alighting upon and taking off from the waters of the Red River adjoining Johannesson's property, does not appear. Since, however, the right to alight and take off without the right to maintain facilities upon the shore

(1) [1946] A.C. 193 at 207. (2) (1908) 21 M.R. 405.

where the planes might be serviced and repaired would be presumably valueless, the prohibition in the by-law against the building or installation of any machine-shop for the testing or repairing of aircraft in the defined area is effective in preventing the operation by Johannesson of a commercial airport or aerodrome for planes designed to alight upon the water.

In my opinion, the position taken by the province and by the municipality in this matter cannot be maintained. Whether the control and direction of aeronautics in all its branches be one which lies within the exclusive jurisdiction of Parliament, and this I think to be the correct view, or whether it be a domain in which Provincial and Dominion legislation may overlap, I think the result must be the same. It has been said on behalf of the respondents that the by-law is merely a zoning regulation passed in exercise of the powers vested in the municipality elsewhere in the Municipal Act and I understand the section referred to is that portion of section 896 which, under the heading "Zoning trades", empowers a municipal corporation to pass by-laws for preventing the erection of certain specified buildings and the carrying on of certain occupations within defined areas, these including the erection, establishment or maintenance of machine shops which would presumably cover those designed for the repair of aircraft. The by-law, in so far as it prohibits the erection, maintenance or continuation of aerodromes, must depend for its validity upon s. 921: subsec. 3 is apparently based upon subsec. (*h*) of s. 896. The inclusion of the prohibition of the erection or maintenance of a machine-shop, however, is obviously for the purpose of preventing the use either of the strip of land fronting upon the river or the surface of the river adjoining to the east as an effective aerodrome. Section 921 was undoubtedly passed for the purpose of enabling municipal corporations to prohibit or to license or regulate the activity of aeronautics in and upon the lands and the waters within their boundaries, and not merely as an addition to the powers of zoning trades assumed to be given by s. 896. Had this been intended and irrespective of any question as to its validity, no doubt it would have been done by amendment to subsec. (*f*) or (*h*) of s. 896. The powers sought to be conferred upon the Municipal Council appear to me

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to be in direct conflict with those vested in the Minister of National Defence by the *Aeronautics Act*. Section 3(*a*) of that statute imposes upon the Minister the duty of supervising all matters connected with aeronautics and prescribing aerial routes and by s. 4 he is authorized, with the approval of the Governor in Council, to make regulations with respect to, *inter alia*, the areas within which aircraft coming from any place outside of Canada are to land and as to aerial routes, their use and control. The power to prescribe the aerial routes must include the right to designate where the terminus of any such route is to be maintained, and the power to designate the area within which foreign aircraft may land, of necessity includes the power to designate such area, whether of land or water, within any municipality in any province of Canada deemed suitable for such purpose.

If the validity of the *Aeronautics Act* and the Air Regulations be conceded, it appears to me that this matter must be determined contrary to the contentions of the respondent. It is, however, desirable, in my opinion, that some of the reasons for the conclusion that the field of aeronautics is one exclusively within Federal jurisdiction should be stated. There has been since the First World War an immense development in the use of aircraft flying between the various provinces of Canada and between Canada and other countries. There is a very large passenger traffic between the provinces and to and from foreign countries, and a very considerable volume of freight traffic not only between the settled portions of the country but between those areas and the northern part of Canada, and planes are extensively used in the carriage of mails. That this traffic will increase greatly in volume and extent is undoubted. While the largest activity in the carrying of passengers and mails east and west is in the hands of a government controlled company, private companies carry on large operations, particularly between the settled parts of the country and the North and mails are carried by some of these lines. The maintenance and extension of this traffic, particularly to the North, is essential to the opening up of the country and the development of the resources of the nation. It requires merely a statement of these well recognized facts to demonstrate that the field of aeronautics

is one which concerns the country as a whole. It is an activity, which to adopt the language of Lord Simon in the *Attorney General for Ontario* v. *Canada Temperance Federation* (1), must from its inherent nature be a concern of the Dominion as a whole. The field of legislation is not, in my opinion, capable of division in any practical way. If, by way of illustration, it should be decided that it was in the interests of the inhabitants of some northerly part of the country to have airmail service with centres of population to the south and that for that purpose some private line, prepared to undertake such carriage, should be licensed to do so and to establish the southern terminus for their route at some suitable place in the Municipality of West St. Paul where, apparently, there is an available and suitable field and area of water where planes equipped in a manner enabling them to use the facilities of such an airport might land, it would be intolerable that such a national purpose might be defeated by a rural municipality, the Council of which decided that the noise attendant on the operation of airplanes was objectionable. Indeed, if the argument of the respondents be carried to its logical conclusion the rural municipalities of Manitoba through which the Red River passes between Emerson and Selkirk, and the City of Winnipeg and the Town of Selkirk might prevent the operation of any planes equipped for landing upon water by denying them the right to use the river for that purpose.

It is true that the decision in the *Aeronautics Reference* (2), really turned upon the point that by virtue of s. 132 of the British North America Act it was within the power of Parliament to enact s. 4 of the *Aeronautics Act,* c. 3, R.S.C. 1927, and to authorize the adoption of the Air Regulations referred to in the questions submitted to the Court. There were, however, expressions of opinion on other aspects of the matter in the judgment delivered by Lord Sankey L.C. which are of assistance. At page 70 of the report His Lordship, in referring to the respective field assigned to Parliament and the Legislatures, said in part:

> While the Courts should be jealous in upholding the charter of the Provinces as enacted in s. 92 it must no less be borne in mind that the real object of the Act was to give the central government those high

(1) [1946] A.C. 193 at 205. (2) [1932] A.C. 54.

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functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to all the provinces as members of a constituent whole.

Again, in the conclusions of the judgment, it is stated that their Lordships were influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance and that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion. In *A.G. for Ontario* v. *A.G. for Canada* (1), Lord Watson, referring to the authority given to Parliament by the introductory enactment of s. 91 to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislatures of the provinces, said that the exercise of these powers ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance. This passage from Lord Watson's judgment is incorporated in the second of the four propositions stated by Lord Tomlin in *A.G. for Canada* v. *A.G. for British Columbia* (2). The passage from the judgment of Lord Simon in *A.G. for Ontario* v. *Canada Temperance Federation* (3), reads:—

> In their Lordships' opinion the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the *Aeronautics* case (4), and the *Radio* case (5), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures.

While the statement of Lord Sankey in the *Aeronautics Reference* that aerial navigation is a class of subjects which has attained such dimensions as to affect the body politic of the Dominion as a whole, and that of Lord Simon in the Canada Temperance matter in referring to that case and the *Radio* case, were perhaps unnecessary to the decision of those matters, they support what I consider to be the true view of this matter that the whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of

(1) [1896] A.C. 348 at 360.
(2) [1929] A.C. 111 at 118.
(3) [1946] A.C. 193 at 205.
(4) [1932] A.C. 54.
(5) [1932] A.C. 304.

Canada. S. 921 of *The Municipal Act* (R.S.M. 1940 c. 141) clearly trespasses upon that field and must be declared *ultra vires* the province. As to the by-law I am unable, with respect, to agree with the contention that it is a mere zoning regulation or that, even if it were, it could be sustained. On the contrary, I consider it to be a clear attempt to prevent the carrying on of the operation of commercial aerodromes within the municipality. As the right to do this must depend upon s. 921, the by-law must also be declared *ultra vires.*

If this matter were to be considered as dealing with a legislative field where the powers of Parliament and of the Provincial Legislature overlap, I think the result would necessarily be the same since for the reasons above stated it appears to me that the *Aeronautics Act,* and in particular s. 4, is legislation in this field with which s. 921 of *The Municipal Act* clearly conflicts.

The appeal should be allowed with costs and a declaration made that s. 921 of *The Municipal Act* and the municipal by-law are each *ultra vires.* There should be no order as to costs in the proceedings before Campbell J. and the Court of Appeal.

Appeal allowed.

Solicitors for the appellants: *Andrews, Andrews, Thorvaldson, & Eggertson.*

Solicitors for the respondent: *Dysart & Dysart.*

Solicitor for the Intervenant, The Attorney-General for Manitoba: *A. A. Moffat.*

Solicitor for the Intervenant, The Attorney General of Canada: *F. P. Varcoe.*

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*Oct. 15, 16
*Dec. 17.

HARRY MARSH (DEFENDANT) .....APPELLANT;

AND

ALEX KULCHAR (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Automobile—Master and servant—Car entrusted by owner to wife who put employee in charge for limited purpose not including driving—Whether possession given employee—Negligence of employee in driving—Whether owner has statutory liability—Whether car wrongfully taken out of wife's possession—Vehicles Act, 1945 (Sask.), c. 98, s. 141(1).

By virtue of s. 141(1) of the *Vehicles Act, 1945 (Sask.)*, c. 98, the owner of a car is liable for damage caused by the driver's negligence "unless the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person entrusted by him with the care thereof".

Appellant's wife was entrusted by him with the care of his truck for a trip in which she was accompanied by their farm hand. At her destination, she left the key in the ignition and told the farm hand "to look after the car so no kids could touch it". Although the latter had never driven a car for his employer nor did he have an operator's licence, he decided to drive it to a coffee shop a short distance away. He stated that his reason for driving it there was so that he might continue to watch it. Owing to his negligence, a pedestrian was injured. The action against the appellant was dismissed by the trial judge but maintained by the Court of Appeal for Saskatchewan.

Held (Estey and Cartwright JJ. dissenting), that the appeal should be allowed as the appellant has met the burden placed upon him by the statute.

Per Rinfret C.J., Kellock and Locke JJ.: The farm hand was in the position of a watchman or guard and not that of one to whom possession had been given. When he moved the car for purposes of his own convenience, he took actual physical possession of it, and that was a wrongful taking of possession within the exception in s. 141(1) of the *Act*.

Per Estey J. (dissenting): The section contemplates that the owner is to be relieved of liability only where the driver has exercised a dominion or control inconsistent with the possession of a person in the position of the wife. No such case was made here. Not only did he not deprive the wife of possession but, on the contrary, he sought to continue his supervision in order that her possession would neither be disturbed nor damaged.

Per Cartwright J. (dissenting): The farm hand was not given possession of the truck but only the custody of it. The truck was never taken out of the wife's possession, since the farm hand's lawful custody could be converted into wrongful possession only if there was an intention on his part to hold the truck as his own and to the wife's exclusion, and no such finding would be consistent with the facts.

*PRESENT: Rinfret C.J. and Kellock, Estey, Locke and Cartwright JJ.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the decision of the trial judge and holding the appellant, as owner of the car, liable for the damages caused by the negligent driving of his employee.

G. H. Yule K.C. and *E. M. Woolliams* for the appellant. The contention of the appellant is that there was no finding by the trial judge that the wife gave any instructions to the farm hand with respect to the truck. The trial judge only assumed that there had been instructions. If there were no instructions as contended, then the truck was stolen. There is express denial that such instructions were ever given. Assuming that there had been instructions, there is no evidence that the farm hand ever agreed to carry them out. The fact that he was in the general employment of the appellant is not relevant.

But even if there were such instructions, the owner cannot be held liable since the farm hand was not put in possession but only given the custody. *Smith* v. *Webb* (2) is relied on. When he started to drive he took possession away or out of the owner. The word "wrongfully" in the section, means that there was no consent express or implied. He never had possession within the concept of that word in *Vancouver Motors-U Drive Ltd.* v. *Terry* (3).

The true interpretation of the section is that if an owner delivers possession to anyone for the purpose of the vehicle being driven, then he is liable for the damage and it makes no difference if the person so entrusted drives in violation of the instructions of the owner.

Cases at common law as to liability of the master for the acts of the servant are not helpful, since under the section, the master would have been liable no matter for what purpose the servant drove the vehicle.

But cases more pertinent at comman law are cases where the servant improperly took the master's vehicle, such as: *Halperin* v. *Bulling* (4), *Limpus* v. *London General Omnibus Co.* (5), and *Beard* v. *London General Omnibus Co.* (6).

(1) [1951] 3 D.L.R. 64.
(2) (1896) 12 T.L.R. 450.
(3) [1942] S.C.R. 391 at 402.
(4) (1914) 50 Can. S.C.R. 471.
(5) 158 E.R. 993.
(6) (1900) 2 Q.B. 530.

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If, at common law, there would have been no liability on the appellant for the reason that the servant wrongfully drove the vehicle, then the language of the section cannot be strained to impose liability, in virtue of the rule of strict construction of a statute that tends to modify the common law.

No argument can be advanced that when he moved the truck, he was acting in the interests of the master, as there is no such finding by the trial judge. Even if he decided to take it to where he was going in breach of his duty to watch it where it was, he still would be taking it improperly if his reason for taking it was to watch it at a new location to which he wished to go for his own private purposes.

F. B. Zurowski for the respondent. A perusal of the various amendments of the *Act* discloses that the legislature has been enlarging on the common law liability of the owners of vehicles. Therefore, the common law is not of assistance to this case. The question of the extent of the owner's liability, once it is clear the driver was placed in possession was dealt with in *Sebda* v. *Hupka & Buchkowski* (1). Asking somebody to watch the car amounted to giving possession of it, in the circumstances here. There is no evidence to contradict the evidence of the farm hand respecting the instructions. The trial judge has held that he exceeded his instructions and that he had no authority to drive the car. That is a finding of credibility which is supported by the evidence and by the circumstances.

There is an essential difference in law between the liability of the owner for the acts of one who has been placed in possession of the vehicle and exceeds his authority by moving it, and his liability for the acts of one who obtains possession of the vehicle either by theft or wrongful means (*Bailey* v. *Manchester Sheffielf & Lecolnshire Ry. Co.* (2).

The following authorities are submitted on the question of the owner's liability: *Vancouver Motors-U Drive Ltd.* v. *Terry* (*supra*), *Volkert v. Diamond Truck Co.* (3), *Lloyd* v. *Dominion Fire* (4), *Bobby* v. *Chodiker* (5) and *Smith* v. *Drewrys Ltd.* (6). The case of *Smith* v. *Webb* cited by the appellant (*supra*) is of no assistance here.

(1) [1950] 2 W.W.R. 165.
(2) 7 C.P. 415.
(3) [1940] S.C.R. 455.
(4) [1940] 1 W.W.R. 210.
(5) [1929] 1 W.W.R. 770.
(6) [1937] 1 W.W.R. 107 at 110.

The judgment of the Chief Justice and of Kellock and Locke JJ. was delivered by

KELLOCK J.:—This appeal arises under the provisions of sub-s. (1) of s. 141 of the *Saskatchewan Vehicles Act,* 1945, c. 98, the material part of which reads as follows:

> . . . when any loss, damage or injury is caused to any person by a motor vehicle . . . the owner thereof shall also be liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury, the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person intrusted by him with the care thereof.

The respondent was injured by a motor vehicle driven by one Beukert, a farm hand in the employ of the appellant, the owner of the car. So far as his employment is concerned, however, Beukert had nothing to do with the motor car, and had no license to drive. On the evening in question, he had merely accompanied the appellant's wife in the car to a supper in the village of Mistatim, which was to be followed by a dance. On arriving at the village, Mrs. Marsh left the key of the car in the ignition for the reason that, as she explains, she had not her purse with her and was afraid she might lose the key if she took it with her. While Mrs. Marsh denies she spoke to Beukert about the car at all, he says she did, and that the substance of what she said was,

> she told me to look after it so no kids . . . could touch it.

Mrs. Marsh and one or two friends who had accompanied her, went into the supper, as did Beukert, and some time later, it is suggested when Mrs. Marsh was at the dance, Beukert got into the car and drove it a short distance to a restaurant, in front of which the accident in which the respondent was injured, occurred.

The learned trial judge accepted Beukert's version of what had been said by Mrs. Marsh with respect to the car on their arrival at the village, and on that evidence, held that Beukert had not been given possession of the car and that in driving it as he did, he had wrongfully taken it out of her possession. In the Court of Appeal (1), Proctor J.A., who delivered the judgment of himself, Gordon, McNiven and Culliton JJ.A., construed this judgment as proceeding on the ground that possession of the car had been

(1) [1951] 3 D.L.R. 64.

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given by Mrs. Marsh to Beukert, and that the latter in driving it, had merely exceeded his authority. Martin C.J.S., who delivered a separate judgment, took a similar view.

With respect, I do not think the trial judgment is open to such a construction. The finding of the learned judge is an express one that Beukert "wrongfully took the truck out of the possession of Mrs. Marsh," which presupposes that possession had never in fact been delivered to him. He says that on the basis of what was said by Mrs. Marsh, all Beukert had to do was to "keep his eye on the truck and leave it where it was." In my view, the evidence is not open to any other interpretation, and Beukert's position, on his own story, was that of a watchman or guard, and not that of one to whom possession had been given. Accordingly, when he drove the car, that was, as against Mrs. Marsh and the appellant, a wrongful taking of possession.

Respondent's counsel contended that it was within the contemplation of Mrs. Marsh that the car should be driven by Beukert. In my opinion, this contention is not open upon the words used. Moreover, Beukert admits that, to him, they had no such implication. It is worth while quoting, on this point, a further extract from his evidence:

Q. But you got in the truck?
A. Yes.
Q. Knowing that you should not drive it?
A. Yes.
Q. And where were you going with it?
A. Going over to the cafe and have coffee.

Coming to the statute, the owner is not liable if it be shown that the motor vehicle had been stolen from him or "otherwise wrongfully taken out of his possession," or "out of the possession of any person entrusted by him with the care thereof."

The word "possession" in English law is, as has often been pointed out, a most ambiguous word. As most often used, however, it imports actual physical possession. As stated by Erle C.J. in *Bourne* v. *Fosbrooke* (1),

"In most instances, it is considered to import the manual custody of the chattel."

(1) (1865) 18 C.B.N.S. 515 at 526.

In *The Tubantia* (1), Sir Henry Duke, P., said:

> I have also taken this to be a true proposition in English law: a thing taken by a person of his own motion and for himself, and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession.

When a motor car is stolen from the owner, the thief takes actual physical possession, and thus takes it out of the possession of the owner, although the right to possession remains with the latter. That this is the idea in contemplation of the statute is shown by the use of the phrase, "or otherwise . . . taken out of his possession." The statute also contemplates that the person to whom the care of the car has been entrusted, has been put into possession by the owner, as it deals with the wrongful taking out of the possession of such person. When actual physical possession is taken of a motor car by the wrongful act of another, it is, in the contemplation of the statute, taken out of the possession of the owner or such other person.

There is no doubt that when Beukert moved the car for purposes of his own convenience, he took actual physical possession as above described, thereby depriving Mrs. Marsh of possession. In my opinion, this was a wrongful taking.

In Pollock and Wright on "possession in the Common Law," the authors deal at p. 120 with the case of a person having a right to a particular chattel which may or may not coincide with the right of ownership, and secondly with the case of mere physical possession without either ownership or right to possession. They point out at p. 121 that a violation of the first of these relations is a conversion or "wrongful detention," while a violation of the second is a trespass. In the latter case, if a stranger take the chattel away without leave, the possession is "wrongfully" changed and the former possessor, whether he be owner or not, can bring either trover or trespass de bonis asportatis, and if the trespass be committed animo furandi, the trespasser may be prosecuted for theft from the possessor. A wrongful taking in circumstances such as are here present is also rendered a crime by s. 285(3) of the *Criminal Code*. The difference between such wrongful taking and theft is, of course, the presence in the latter case of fraudulent intent.

(1) [1924] P. 78.

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I think, therefore, the appellant met the burden placed upon him by the statute, and that the action was properly dismissed at the trial. I would therefore allow the appeal with costs here and below, and restore the judgment of the trial judge.

ESTEY J. (dissenting):—The appellant, owner of a 1940 Ford truck, appeals from a judgment of the Court of Appeal in Saskatchewan (1) under which, by virtue of the provisions of sec. 141(1) of the *Vehicles Act* (S. of Sask. 1945, c. 98), he has been held liable for damage suffered by the respondent when an employee of his, Beukert, was driving the truck. The contention of appellant is that Beukert had wrongfully taken the truck and, therefore, that he, as the owner, is not liable within the exception to sec. 141(1). Sec. 141(1) reads as follows:

> 141(1) 1. Subject to the provisions of subsection (2), when any loss, damage or injury is caused to any person by a motor vehicle, the person driving it at any time shall be liable for the loss, damage or injury, if it was caused by his negligence or improper conduct, and the owner thereof shall also be liable to the same extent as the driver unless at the time of the incident causing the loss, damage or injury the motor vehicle had been stolen from the owner or otherwise wrongfully taken out of his possession or out of the possession of any person intrusted by him with the care thereof.

The accident occurred about 8:30 Saturday evening, September 6, 1947. Beukert had been employed for a month prior thereto upon appellant's farm, where it was no part of his duty to drive, nor did he drive, this truck or any motor vehicle. In fact, he did not have a driver's licence. On the evening in question the appellant's wife drove the truck, with her sister-in-law and Beukert as passengers, into Mistatim to attend a fowl supper and social evening. When she parked the truck in Mistatim, having left her purse at home, she left the keys in the ignition because she thought they were safer there than in her pocket. Beukert deposed that Mrs. Marsh, as she parked the truck, asked him to look after it and, at another time, added "so no kids could touch it." This was denied by Mrs. Marsh and, in effect, by her sister-in-law. Beukert, when the truck was parked, separated from the women. About 8:30 he decided to have a cup of coffee and, as he says, was moving the truck about 125 feet to a spot where

(1) [1951] 3 D.L.R. 64.

he could watch it from the inside of the coffee shop. It was in the course of so moving the truck that he struck and seriously injured the respondent.

Mr. Yule contended that the learned trial judge did not make a finding of fact to the effect that Mrs. Marsh had requested Beukert to keep the "kids" away from the truck. The learned trial judge first stated his conclusion to the effect that Beukert had wrongfully taken the truck and then stated: "The evidence is this," and went on to state certain facts, including "Mrs. Marsh said to Beukert to take care of the truck and keep the kids away or something to that effect." The learned trial judge did not suggest that he was summarizing the evidence, or in any way reviewing it, and, when read as a whole, it appears that he was setting forth the facts which he found in support of the conclusion he had already stated. I am, therefore, in agreement with Mr. Justice Procter, with whom Mr. Justice McNiven and Mr. Justice Culliton agreed, that "the trial judge accepted Beukert's story."

That the injury resulted from the negligent driving of Beukert there is no question and no appeal is taken from the judgment rendered against him.

Section 141(1) imposes upon appellant liability "to the same extent" as upon Beukert for the latter's "negligence or improper conduct" in driving the truck. It then provides, by way of an exception, that the appellant may be relieved of that liability if it be established that Beukert had "stolen" or "otherwise wrongfully taken" the truck "out of the possession of any person intrusted by him with the care thereof."

That the appellant, as owner, had intrusted Mrs. Marsh with the care of the truck and that she was, therefore, a person in possession thereof, within the meaning of the section, was not contested.

Mrs. Marsh, when she requested Beukert to take care of the truck, as found by the learned trial judge, retained possession thereof. The appellant's contention is that Beukert, in moving the truck as aforesaid, took it out of her possession within the meaning of sec. 141(1).

That Beukert had neither a licence nor permission to drive the truck, and, therefore, in doing so acted wrongfully is apparent. That his conduct in this regard ought

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not to be condoned must be conceded. That he acted wrongfully, however, is not sufficient. It must be established, in order for the appellant to succeed, that Beukert's conduct was such that it brought him within the section as one who had "otherwise wrongfully taken" the truck "out of the possession of" Mrs. Marsh. The words "otherwise wrongfully taken . . . out of the possession of" are words, apart from any context, sufficiently wide and comprehensive to include many wrongs, but, as here used in association with the word "stolen," they must be given a more restricted meaning. "Theft" is defined in sec. 347 of the *Criminal Code* as

> the act of fraudulently and without colour or right taking . . . with intent,
>
> (*a*) to deprive the owner . . .

The specific intent essential in sec. 347 of the *Criminal Code* is not required under that portion of sec. 141(1) with which we are here concerned. In both sections there must be a taking. The Legislature, by its language in sec. 141(1), contemplates more than an interference with possession sufficient to constitute a mere trespass, even if that include a moving of the motor vehicle. It would rather appear that in using the words "wrongfully taken . . . out of the possession of" the Legislature intended the owner should be relieved of liability only where the driver has exercised a dominion or control inconsistent with the possession of a person in the position of Mrs. Marsh. The evidence accepted by the learned trial judge does not support such a taking.

Whether, within the meaning of sec. 285(3), Beukert's moving of the truck constituted a taking with intent to operate or drive need not be here ascertained. It is sufficient to observe that a prosecution under that section does not raise any question of taking out of possession, but rather of a taking without the consent of the owner. The owner's consent is an essential factor under that section and as it is in sections corresponding to sec. 141(1) in some of the other provinces. In the statute here in question it is the wrongfully taking out of the possession which involves quite distinct issues.

Beukert was employed by Mrs. Marsh. He had been requested to give supervision to the truck by Mrs. Marsh and when, in the course of the evening, he desired a cup of

coffee he decided not to neglect, but rather continue, his supervision of the truck by moving it. That in the course of so moving it he inflicted the unfortunate injuries for which damages are here claimed does not alter or affect his conduct in relation to the question of whether Mrs. Marsh was deprived of her possession of the truck. Beukert, in moving the truck, did not assert any control or dominion over it inconsistent with the possession of Mrs. Marsh; nor did he, in fact, deprive her of her possession. On the contrary, he sought to continue his supervision in order that her possession would neither be disturbed nor damaged. It cannot, therefore, be said that the conduct of Beukert constituted him as one who had "otherwise wrongfully taken" the truck "out of the possession of" Mrs. Marsh, within the meaning of sec. 141(1).

The appeal should be dismissed.

CARTWRIGHT J. (dissenting):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan (1) allowing an appeal from a judgment of McKercher J. and directing judgment to be entered in favour of the respondent for the amount of damages assessed by the learned trial judge.

The detailed facts of the case are stated in the judgment of my brother Estey and certain relevant portions of the evidence are set out in the judgment of Procter J.A. but in order to make plain the grounds upon which my opinion is based it is desirable that I should summarize what I regard as material.

It was not contested that the respondent's injuries were caused by the negligence of Beukert in driving a motor truck owned by the appellant or that the possession and care of such truck had been entrusted by the appellant to his wife on the evening of the accident. The following findings of fact appear to me to have been made by the learned trial judge and concurred in by the Court of Appeal and to be supported by the evidence. (i) Beukert was at the time of the accident and had been for some weeks prior thereto employed by the appellant. (ii) During this time he had not operated the motor vehicle which injured the respondent or any other motor vehicle belonging to the

(1) [1951] 3 D.L.R. 64.

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appellant. (iii) Beukert was not licensed to drive a motor vehicle. (iv) On the evening of the accident the wife of the appellant had left the key in the truck and had told Beukert "to look after the truck so that no kids could touch it." (v) While Beukert was taking care of the truck he wanted a cup of coffee and decided to get this at a coffee shop, distant 125 feet from where the truck was standing. (vi) He decided to drive the truck to the coffee shop so that he could continue to keep the truck in his sight through the window while having his coffee. (vii) Beukert thought he was justified in doing this. (viii) The respondent was struck by the truck just as Beukert was completing the journey of 125 feet.

It was not seriously suggested that under these circumstances Beukert could be said to have stolen the truck but the learned trial judge was of the view that the result in law of the facts stated was that Beukert at the moment of the accident had wrongfully taken the truck out of the possession of a person (Mrs. Marsh) entrusted by the appellant with the care thereof, within the meaning of section 141(1) of the *Vehicles Act*, S. of Sask., 1945, c. 98.

In the Court of Appeal, Procter J.A., with whom McNiven and Culliton JJ.A. agreed, proceeds on the basis that Mrs. Marsh had given possession of the truck to Beukert and that consequently although he had exceeded his authority in driving it he could not be said to have taken it wrongfully out of her possession. The learned Chief Justice of Saskatchewan, with whom Gordon J.A. agrees, speaks of Beukert having been "put in charge of the truck for a limited purpose by Mrs. Marsh" and also says in part: "Beukert was in possession of the truck and in a position to drive it." The Court were unanimous in allowing the appeal.

I am in agreement with the Court of Appeal as to the result and, bearing in mind the often repeated statement that "possession is a word of ambiguous meaning" (vide e.g., Halsbury, 2nd Edition, Vol. 25, pages 194 et seq), I am not prepared to differ from the reasons given, but it seems to me that I should have reached the same conclusion on a somewhat different view as to the legal result of the facts found.

I incline to the view that Mrs. Marsh did not give Beukert possession of the truck but only the custody of it. As is said in Stephen's Digest of the Criminal Law, 9th Edition, at page 304: "A moveable thing is in the possession of . . . the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure." If this be the right view, in my opinion, Beukert at no time took the truck out of Mrs. Marsh's possession at all. In order that Beukert's lawful custody should be converted into wrongful possession it would be necessary to find an intention on his part to hold the truck, at least temporarily, as his own and to the exclusion of Mrs. Marsh. Such a finding would, I think, be quite inconsistent with the facts stated above. Beukert's intention in moving the truck was not to take it from Mrs. Marsh's possession but rather to enable him to continue to keep the custody of it with which he had been entrusted while at the same time enjoying the cup of coffee which he desired.

It seems to me that there is danger of confusion arising from the facts that the moving of a truck by an inexperienced driver is always attended with the possibility of causing damage and that Beukert was not licensed to drive. As was pointed out by Fisher J.A. speaking for the majority of the Court of Appeal for Ontario in *Thompson* v. *Bourchier* (1), the operation of an automobile is not necessarily synonymous with the possession of an automobile. It could not, I think, be successfully argued that if instead of committing the truck to Beukert's care Mrs. Marsh had handed him her suit-case to look after and he had carried it less than fifty paces to purchase a cup of coffee that he would have thereby wrongfully taken the suit-case out of her possession.

For the appellant it was argued that when Beukert commenced to drive the truck he thereby deprived Mrs. Marsh of the "actual physical possession" thereof and that this was wrongful as he had neither the consent of the owner nor the license to drive required by law. The fallacy of this argument is that at the moment when Beukert commenced to drive Mrs. Marsh did not have the "actual physical possession"; she was physically absent; and if the word "possession" in section 141(1) is synonymous with

(1) [1933] O.R. 525 at 529, 530.

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the words "actual physical possession" as used in this argument then Mrs. Marsh had transferred such possession to Beukert when she committed the truck to his care and went about her business. Unless and until it appears that the truck had been taken out of her possession an inquiry as to whether the conduct of the alleged taker was wrongful is irrelevant.

It was further submitted on behalf of the appellant that Beukert took the car out of Mrs. Marsh's possession because he drove it solely for his own purposes thereby evidencing an intention to hold it, at least for a time, as his own. But this argument fails on the evidence and on the findings of fact. Beukert's reason for moving himself to the coffee shop was for his own purpose of drinking a cup of coffee. He could and normally would have fulfilled that purpose without moving the truck. His reason for driving the truck to the coffee shop, instead of temporarily abandoning it, was so that he might continue to watch it while having the coffee.

In my opinion on the facts as found the appellant is not within the exception from liability which the section provides.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Van Blaricom & Woolliams.*

Solicitor for the respondent: *F. B. Zurowski.*

JOHN KISSICK, PETER KISSICK, WILLIAM KISSICK, STELLA (SALLY) SMALLWOOD ..... APPELLANTS;

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*Dec. 3, 4.
1952
*Jan. 8.

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Criminal law—Evidence—Conspiracy to sell, etc. narcotic drugs—Certificates of analysts only evidence of narcotics—Whether certificates admissible—No objection by defence—Testimony of analysts heard before Court of Appeal—Whether Court has that power and whether it could then affirm conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49, s. 18—Criminal Code, ss. 1014, 1021.

The appellants were found by a jury to be guilty on three charges laid under s. 573 of the *Criminal Code* of conspiracy to possess, to sell and to transmit narcotic drugs in violation of the *Opium and Narcotic Drug Act, 1929,* (S. of C. 1929, c. 49). The only proof tendered at the trial that the substance was a narcotic drug, consisted of certificates of two analysts. The analysts were not heard as witnesses, although one of them was offered for cross-examination. Counsel for the accused did not at any time object to the admission of the certificates nor to the trial judge's reference to them in his charge as being "conclusive evidence" of the substance of the narcotic drug. On appeal, the accused contended that this evidence, although admissible under s. 18 of the *Opium and Narcotic Drug Act, 1929,* on a charge under that *Act,* was not admissible where the charge was one of conspiracy under the *Code.* Thereupon, the Crown asked for, and obtained, leave under s. 1021 of the *Code* to call the analysts at the hearing of the appeal; their testimony was heard in the absence of the accused, who declined to attend but who were represented by counsel who cross-examined the witnesses on behalf of the accused. The Court of Appeal for Manitoba affirmed the convictions.

By leave granted by this Court, the accused appealed on two questions of law: (*a*) whether the Court of Appeal was empowered under ss. 1014 and 1021(1) (*b*) of the *Criminal Code* to allow the Crown to produce before that Court the oral evidence given by the analysts, and (*b*) whether the Court of Appeal was empowered on such evidence, taken in conjunction with that given at the trial, to affirm the convictions.

Held: The appeals should be dismissed and the convictions affirmed since the Court of Appeal was justified in allowing the taking of further evidence and in affirming the convictions (Kerwin J., dissenting in part, would have ordered a new trial).

Per Kerwin, Estey and Locke JJ.: The certificates were not admissible in evidence (*Desrochers* v. *The King,* 69 C.C.C. 322, overruled). (Taschereau J. expressing no opinion on that question, and Fauteux J. *contra*).

*PRESENT: Kerwin, Taschereau, Estey, Locke and Fauteux JJ.

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Per Taschereau; Estey and Locke JJ.: In the circumstances of this case, having considered that it was necessary or expedient in the interests of justice to admit further evidence on a non-controversial issue, the Court of Appeal did not infringe any principle of law governing the exercise of the power to hear further evidence given to it by s. 1021(1) (*b*) of the *Code,* whose provisions are available to a respondent as well as to an appellant.

Since there is no restriction as to the effect to be given by the Court of Appeal to the further evidence in disposing of the appeal under s. 1014 of the *Code,* and since the evidence heard before the Court of Appeal was in its nature conclusive and did not reveal new facts that might influence a jury to come to a different conclusion, the Court of appeal followed the proper course in confirming the convictions.

Per Fauteux J.: The additional evidence, introduced in appeal, was not essential to legally support the verdict since the certificates were admissible evidence of the facts therein stated, as on a true interpretation of s. 18 of the *Opium and Narcotic Drug Act* the prosecution in the present case was a prosecution under that *Act.* (*Simcovitch* v. *The King* [1935] S.C.R. 26 and *Robinson* v. *The King* [1951] S.C.R. 522 referred to). But in any event, although the failure to object to inadmissible evidence is not always fatal, since the defence manifested a positive intention to accept the certificates as sufficient evidence of the facts therein stated or else opted to attempt to preserve a possible ground of appeal, the accused cannot now raise this point; and, as there was no substantial wrong or miscarriage of justice, the appeal should be dismissed.

Per Kerwin J. (dissenting in part): The Court of Appeal was empowered by s. 1021(1) (*b*) of the *Code* to direct that further evidence be taken to support the convictions of the appellants, but it was not empowered on the evidence of the analysts taken before it and on the evidence at the trial to affirm the convictions because it would thereby be usurping the functions of the jury; it is impossible to say what view the jury might have taken if they had heard the analysts and hence it cannot be said that no substantial wrong or miscarriage of justice had occurred within s. 1014(2) of the *Code.*

APPEALS from the judgment of the Court of Appeal for Manitoba (1) affirming the appellants' convictions by a jury on charges of conspiracy to sell, etc. narcotic drugs in violation of the *Opium and Narcotic Drug Act, 1929.*

Harry Walsh and C. N. Kushner for the appellants. The certificates of analysis were wholly inadmissible in evidence, they were not proof of a drug or drugs within the meaning of the *Opium and Narcotic Drug Act, 1929,* and the jury should not have been directed that these certificates constituted such proof and that the jury was to take the contents of the said certificates as conclusive evidence of the facts stated therein, since s. 18 of the *Opium and Narcotic Drug Act, 1929,* is not applicable to a charge of conspiracy

(1) 59 M.R. 86; 100 Can. C.C. 130.

under s. 573 of the *Criminal Code*. It is clear from the wording of s. 18 of the *Act*, that the departure from the ordinary rules of evidence requiring oral testimony, is only authorized in a prosecution under that *Act*. It became therefore vitally necessary for the prosecution to prove the existence of narcotic drugs within the meaning of the *Act*. When the certificates are eliminated there is no proof anywhere of the existence of a drug. The jury therefore should have been directed that there was a complete lack of proof of the existence of any drug within the meaning of the *Act*.

The Court of Appeal having come to the conclusion that the jury's verdict was unsupported by proper evidence, and that the certificates had been improperly admitted in evidence, should have allowed the appeal under s. 1014(1) (*a*) of the *Code* (*Govin* v. *The King* (1) and *The King* v. *Drummond* (2)).

For an interpretation of what is meant by the words "having regard to the evidence" in s. 1014(1) (*a*) of the *Code*, the case of *R.* v. *Dashwood* (3) is referred to.

The Court of Appeal had no power to order the examination of the analysts before that Court. S. 1021(1) (*b*) of the *Code* must be interpreted as referring only to the hearing of "newly-discovered evidence" or "new evidence" and not to evidence that was known and that could have been produced at the trial as was the case here. Furthermore, s. 1021(1) (*b*) applies only to evidence that is brought forward on behalf of an appellant in order to set aside the verdict of a jury, but not to the evidence that is tendered by a respondent in order to supply gaps in a case or to support or bolster up a verdict. All the decisions both in England and Canada point up the fact that such evidence will not be received unless it was such that could not have been adduced at the trial and the power to hear fresh evidence is exercised with great caution. S. 1021 was first passed in Canada in 1923 and is practically the same as s. 9 of the *English Criminal Appeal Act, 1907*. A resume of the English decisions indicates that the instances in which evidence is admitted before the Court of Appeal are very limited and that, without exception, so far as can

(1) [1926] S.C.R. 539. (2) 10 Can. C.C. 340.
(3) 28 C.A.R. 167.

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be found, it is always at the instance of the appellant in the case that new evidence is admitted, if at all. (*McGrath* v. *R.* (1), *Thorne* v. *R.* (2), *Hyman Kurasch* v. *R.* (3), *Warren* v. *R.* (4), *Knox* v. *R.* (5), *Hullett* v. *R.* (6), *Allaway* v. *R.* (7), *William Ward* v. *R.* (8), *Mason* v. *R.* (9), *Weisz* v. *R.* (10), *Starkie* v. *R.* (11), *R.* v. *Mortimer* (12), *R.* v. *Hewitt* (13), *R.* v. *Dutt* (14), *R.* v. *McGerlymchie* (15), *R.* v. *Livock* (16) and *R.* v. *Robinson* (17)). It would be usurping the function of the jury altogether, if every time a certain essential bit of evidence was not proved properly and by evidence properly admissible, by the prosecution, it was permitted to the Crown respondent to adduce that evidence before the Court of Appeal in order to have the appeal dismissed.

A resume of the Canadian decisions also indicates that the application can only be made by an appellant who is seeking to upset the verdict of the jury or trial Court and cannot be invoked by a respondent in order to fill a gap in the evidence presented to the jury. Neither the case of *R.* v. *Feeney* (18) nor *R.* v. *Buckle* (19) support the course that was adopted by the Court of Appeal in hearing the analysts. The case of *Berret* v. *Sainsbury* (20) is useful to show what is done in civil matters where the Court has the same power as given by s. 1021.

Even if the Court of Appeal did have the power to hear the evidence of the analysts, such evidence could only be used for the purpose of determining whether there should be a new trial or an acquittal, and could not be used for the purpose of taking same in conjunction with the evidence given at the trial, and then used to dismiss the appeal. The Court of Appeal should have allowed the appeal since there was no proof adduced of any drugs within the meaning of the Act, and then either quash the convictions or direct a new trial (*R.* v. *Drummond* (21)).

(1) [1949] 2 All E.R. 495.
(2) 18 C.A.R. 186.
(3) 13 C.A.R. 13.
(4) 14 C.A.R. 4.
(5) 20 C.A.R. 96.
(6) 17 C.A.R. 8.
(7) 17 C.A.R. 15.
(8) 17 C.A.R. 65.
(9) 17 C.A.R. 160.
(10) 15 CA.R. 85.
(11) 16 C.A.R. 61.
(12) 1 C.A.R. 20.
(13) 7 C.A.R. 219.
(14) 8 C.A.R. 51.
(15) 2 C.A.R. 184.
(16) 10 C.A.R. 264.
(17) 12 C.A.R. 226.
(18) (1946) 2 C.R. 304.
(19) (1949) 7 C.R. 485.
(20) [1928] S.C.R. 72.
(21) 10 Can. C.C. 340.

S. 1014(2) of the *Code* cannot effect the result of a dismissal of the appeal, since the onus is on the respondent to show that the balance of the evidence, apart from the impugned certificates, would certainly or inevitably result in a conviction of the appellants. Without the certificates there cannot have been any possibility of conviction of any of the appellants since there was then no proof of the existence of any drugs within the meaning of the *Act*. (*Northey* v. *The King* (1)).

A. M. Shinbane, K.C., for the respondent. The certificates were admissible in evidence (*Jacobs* v. *R.* (2) and *Desrochers* v. *The King* (3).

The Court of Appeal was empowered to allow the respondent to produce before that Court the oral evidence given by the analysts. S. 1021(1) (*b*) of the *Code* gives it that power. This section corresponds substantially to s. 9 of the *English Criminal Appeal Act, 1907*. But the Court of Criminal Appeal has no jurisdiction to direct a new trial and this limitation of power in some measure at least accounts for the reluctance of that Court to allow evidence to be called which might have been heard at the trial. (*R.* v. *Mason* (4)). Almost all the reported cases deal with "fresh" or "new" evidence. Here the evidence was merely supplementary and confirmatory. Inasmuch as the form in which their evidence was tendered was to be considered faulty, the analysts were called merely to confirm the accuracy of their analyses, the introduction of which as evidence and the reference thereto were not at any time objected to by the defence at any stage of the trial. But under s. 1021, the evidence may be of a character other than "new" or "fresh".

Although the omission by the defence to object does not prevent the defence from raising the objection in the Court of Appeal, nevertheless that omission was a circumstance properly to be considered by the Court. It indicated that the defence either shared in the mistake of the prosecution and the Court, or believed that the accused was not substantially prejudiced by the erroneous form in which the proof of drugs was put before the jury. More so in this case when the notice of appeal arguing that the certificates were

(1) [1948] S.C.R. 135.
(2) [1944] 1 All E.R. 485.
(3) 69 Can. C.C. 322.
(4) 17 C.A.R. 160.

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not admissible was filed the day after the verdict was rendered and on the same day that sentence was passed. (*R.* v. *Stirland* (1) and *R.* v. *Cutter* (2)).

The power and the practice of the Court of Appeal in respect of fresh or new evidence not tendered at the trial may be summarized thus: (*a*) The Court has power to admit it; (*b*) It is a power which must always be exercised with great care; (*c*) The Court will not lay down any definition of what will constitute exceptional or special circumstances; (*d*) The Court will allow evidence to be given which might have been given at the trial, if it is satisfied that the omission was due to a misunderstanding, inadvertence or mistake. (*R.* v. *Robinson* (3), *R.* v. *Weisz* (4), *R.* v. *Hullett* (5), *R.* v. *Warren* (6), *R.* v. *Knox* (7) and *R.* v. *Collins* (8).

Furthermore, that section is a remedial provision and there is no ambiguity in its language. (*R.* v. *Robinson et al* (9) and *R.* v. *McTemple* (10).

The Court of Appeal was empowered on the evidence of the analysts taken in conjunction with that given at the trial, to confirm the convictions, as there was then such overwhelming evidence of guilt that no reasonable jury on a proper direction could or would have failed to convict the appellants, and there was therefore no miscarriage of justice. The converse of the principle in *R.* v. *Gach* (11) is applicable to the present case, and the Court of Appeal was authorized to dismiss the appeal by ss. 1014, 1021 of the *Code,* and by the provisions of the Court of Appeal Act of Manitoba. Because fresh evidence or further or additional evidence is admitted on appeal, it does not follow that the case must be sent back for a new trial (*R.* v. *Feeney* (12) and *R.* v. *Buckle* (13).

The accused had a trial by jury, because, apart from anything else, there was ample evidence to support the verdict as found out by the Court of Appeal, and therefore there was no substantial wrong or miscarriage of justice.

(1) 30 C.A.R. 40.
(2) 30 C.A.R. 107.
(3) 12 C.A.R. 226.
(4) 15 C.A.R. 85.
(5) 17 C.A.R. 8.
(6) 14 C.A.R. 4.
(7) 20 C.A.R. 96.
(8) 34 C.A.R. 146.
(9) 100 Can. C.C. 1.
(10) [1935] 3 D.L.R. 436.
(11) [1943] S.C.R. 250.
(12) 86 Can. C.C. 429.
(13) 94 Can. C.C. 84.

KERWIN J. (dissenting in part):—The four appellants were found by a jury to be guilty on three counts of an indictment charging conspiracies to commit indictable offences, i.e., to unlawfully sell drugs, to unlawfully possess drugs, and to unlawfully cause drugs to be taken or carried from one place to another in Canada—all within the meaning of the *Opium and Narcotic Drug Act, 1929,* as amended, without first having obtained a licence. Convictions were entered and sentences imposed. From these convictions they appealed to the Court of Appeal for Manitoba (1) and during the hearing of their appeals the Crown applied to be allowed to produce before the Court of Appeal, in support of the convictions, the evidence of two analysts who had certified that certain material sold, possessed, or taken or carried, was a narcotic drug within the meaning of the *Opium and Narcotic Drug Act.* The certificates had been put in evidence as if the prosecutions had been under that *Act* instead, as was the fact, for conspiracies under section 573 of the *Criminal Code.* The evidence of the sale, possession, taking or carrying was given as part of the evidence upon which the charges of conspiracy were based.

The Court of Appeal (1) granted the Crown's application and the evidence of the analysts was taken. Upon that evidence and the evidence at the trial, the Court of Appeal dismissed the appeals of the accused. By leave granted under subsection 1 of section 1025 of the *Code* as enacted by section 42 of chapter 39 of the 1948 Statutes, the accused appeal to this Court on the following questions of law:

(1) On the appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021(1) (*b*) of the *Criminal Code* or otherwise to allow the respondent to produce before that Court the oral evidence actually given?

(2) If so, was that Court empowered, on such evidence taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?

(1) 59 M.R. 86; 100 Can. C.C. 130.

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As to the first point, section 1021(1) (*b*) of the *Code* is in the following terms:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice
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> . . .
>
> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; and
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> exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

It is contended that by the words "For the purposes of an appeal under this Part", Parliament never intended to give the Crown, on an accused's appeal, the right to ask, or to give the Court the right to permit, that evidence be heard in support of the conviction of the appellant, particularly when the trial had been with a jury. Emphasis is placed upon section 1014 of the *Code* which provides that on the hearing of an appeal against conviction the Court of Appeal shall allow the appeal if it is of opinion

> (*a*) that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (*b*) that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law;

It is said that the convictions cannot be supported on the evidence because without the certificates there was no evidence that the material in question was a drug within the meaning of the *Opium and Narcotic Drug Act*. Testimony was given at the trial by which, the Crown contends, the jury would have been entitled to find that it was such a drug. The Court of Appeal evidently felt that proposition to be doubtful because, if it were sound, there would have been no occasion to order the taking of the evidence of the analysts. Presuming in the meantime that this is so, the question is squarely raised as to the power of the Court of Appeal to make the order.

We are told that no Canadian case can be found where evidence was taken before the Court of Appeal to support a conviction. Reliance is placed upon the decision of the Ontario Court of Appeal in *Rex* v. *Drummond* (1), where it was held that on a charge of perjury committed at the trial of an indictment, such trial and the indictment, verdict and judgment therein must be proved as matters of record and this not having been done, the conviction was set aside. It is to be noted that that part of section 1021 quoted above was first enacted by section 9 of chapter 41 of the Statutes of 1923, so that at the time of the *Drummond* decision there was no power in the Court of Appeal to receive further evidence. In another case, which was not referred to, *Rex* v. *Ivall* (2), the Ontario Court of Appeal ordered a new trial on a charge that the accused removed a child under the age of fourteen years from the custody of the Children's Aid Society where, on the first trial, the child's age had not been proved. No application was made for leave to produce the evidence before the Court of Appeal.

The 1923 Act was taken from the *Criminal Appeal Act of England, 1907,* and no decisions have been found in England in which the Crown was given leave to do as was done here. In *Rex* v. *Robinson* (3), an application was made by the Crown to introduce evidence that arose after the conviction and therefore could not have been called at the trial, but this was on the basis that such evidence would have a material bearing on the accused's application for leave to appeal from a conviction in view of the fact that one of the grounds stated in the application for leave was that the verdict was against the weight of the evidence and in those circumstances one question that would have to be considered was whether there had been any substantial miscarriage of justice. The evidence admitted was a letter written by the accused in which he admitted the act which it was alleged constituted murder.

The case does show that further evidence will be admitted although there it was of something that occurred after the trial. However, the ground of the decision was the provision in the *Criminal Appeal Act* that the Court of Criminal Appeal may exercise in relation to the proceedings in

(1) (1909) 10 O.L.R. 946. (2) 94 Can. C.C. 388.
(3) 12 C.A.R. 226.

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the Court any other powers which might for the time being be exercised by the Court of Appeal in appeals on civil matters. Considering the similar provisions of section 1021, it appears to me that they are sufficient to empower the Court of Appeal to direct that further evidence be taken.

On the argument, the attention of counsel was directed to the decision of the Court of King's Bench (Appeal Side) of the Province of Quebec in *Desrochers* v. *The King* (1). That decision was not referred to before the Manitoba Court of Appeal (2) or on the application for leave to appeal to this Court. There, the accused were charged under section 573 of the *Criminal Code* with having conspired to commit an indictable offence under *The Excise Act, 1934*. By section 113 of that Act: "In every prosecution under this Act, the certificate of analysis . . . shall be accepted as *prima facie* evidence"; and in the French version: Dans toute poursuite en vertu de la présente loi, le certificat d'analyse . . . est accepté comme *prima facie*. It was held that a certificate was admissible by virtue of that section in the prosecution of the charge of conspiracy under the Code.

Section 18 of the *Opium and Narcotic Drug Act, 1929*, enacts: "In any prosecution under this Act a certificate as to the analysis of any drug or drugs . . . shall be *prima facie* evidence." The French version reads: "Dans toute poursuite instituée sous le régime de la présente loi, un certificat relatif à l'analyse d'une drogue ou de drogues, . . . constitue une preuve *prima facie*". For present purposes, this section, in either version, may be taken to bear the same meaning as section 113 of *The Excise Act, 1934*, in either version. The present proceeding not being a prosecution under the *Opium and Narcotic Drug Act*, section 18 thereof is inapplicable and the decision in *Desrochers* on that point should be overruled.

Section 28 of the *Interpretation Act*, R.S.C. 1927, chapter 1, reads as follows:

> 28. Every Act shall be read and construed as if any offence for which the offender may be
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> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(1) 69 Can. C.C. 322. (2) 59 M.R. 86; 100 Can. C.C. 130.

(*b*) punishable on summary conviction, were described or referred to as an offence; and all provisions of the Criminal Code relating to indictable offences, or offences, as the case may be, shall apply to every such offence.

That section was considered by this Court in *Simcovitch* v. *The King* (1) in conjunction with section 69 of the *Criminal Code* by which anyone is a party to and guilty of an offence who "(*d*) counsels or procures any person to commit the offence." It was held that one who counselled a bankrupt to commit an offence specified in section 191 of the *Bankruptcy Act* was by the combined operation of section 28 of the *Interpretation Act* and section 69 of the *Code* guilty of an offence under section 191 of the *Bankruptcy Act* although that section, by its terms, referred only to a person having been a bankrupt or in respect of whose estate a receiving order has been made, or who had made an authorized assignment under the *Bankruptcy Act.* That decision can have no application here because, within the terms of section 28 of the *Interpretation Act,* there is no provision of the *Criminal Code* which it is suggested might be made applicable. On the contrary, the suggestion is that on a prosecution under the Code a certificate of analysis is to be taken as *prima facie* evidence merely because section 18 of the *Opium and Narcotic Drug Act* states that in any prosecution under that *Act* a certificate is to be so treated. With respect I can find no justification for reading the enactment in that manner.

It was argued that there was sufficient evidence without the certificates but it must be borne in mind that having admitted them, the trial judge instructed the jury that they were conclusive. I am not now dealing with a situation where, on a charge of conspiring to commit an indictable offence under the *Opium and Narcotic Drug Act,* the evidence of such conspiracy is based upon something other than the actual commission of an offence itself. What is relied upon in the present case to prove the conspiracy are specific acts, and the circumstances that witnesses testified at the trial that the article dealt with was heroin and that the accused, or some of them, so designated it to those witnesses, are not sufficient. If articles be sold which were mere substitutes for a narcotic and not within the class of specified drugs, there would be no offence. On the other

(1) [1935] S.C.R. 26.

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hand, the gist of an offence under section 573 of the *Code* is the conspiracy itself, and in a proper case a jury might find that a conspiracy existed to sell a specified narcotic without first having obtained a licence.

In my opinion the second question raises a question of law and the Court of Appeal was not empowered on the evidence of the analysts taken before it and on the evidence at the trial to affirm the conviction because it would thereby usurp the functions of the jury. It is not a matter of interfering with a discretion exercised by the Court of Appeal since it is impossible to say what view a jury might take if they had the analysts before them and hence it cannot be said that no substantial wrong or miscarriage had occurred within section 1014(2) of the *Code*.

The appeal should be allowed and a new trial directed.

TASCHEREAU J.:—The appellants were jointly charged on four counts of conspiracy to violate the *Opium and Narcotic Drug Act*, and were found guilty on three.

At trial, the respondent filed certificates of analysis to establish that the drugs which were possessed and sold by the appellants, were heroine, a drug within the meaning of the *Act*, but the analysts themselves were not heard. Section 18 of the *Act* is to the effect that "in any prosecution under the Act", such certificates signed by a Dominion analyst, constitute *prima facie* evidence of the facts therein stated.

Before the Court of Appeal (1), the appellants submitted that, not having been prosecuted under the *Act*, but for conspiracy under the *Criminal Code*, the certificates were illegal evidence, and that the analysts should have been called. The Court of Appeal (1) obviously agreed with this contention, for at the request of the respondent, it received the evidence of the analysts and unanimously confirmed the conviction. Leave to appeal to this Court was granted by Mr. Justice Kerwin on the two following questions of law:

(1) Was the Court of Appeal empowered under section 1014 and 1021 (1) and (*b*) of the Code or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

(1) 59 M.R. 86; 100 Can. C.C. 130.

(2) If so, was the Court empowered on such evidence taken in conjunction with that given at the trial, to affirm the conviction or was it authorized merely to order a new trial?

If a prosecution for *conspiracy* to possess and sell heroine, *is a prosecution under the Opium and Narcotic Drug Act,* the conviction was valid, and the Court of Appeal did not need to hear new evidence; but in view of the conclusion which I have reached, I do not think it necessary to determine this question.

Section 1021 (*b*) of the Criminal Code is as follows:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice.
>
> (*b*) if it thinks fit, *order any witnesses* who would have been compellable witnesses at the trial *to attend and be examined before the court of appeal,* whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal;

As to the power of the Court of Appeal to hear fresh evidence, I have no doubt, if any meaning is to be given to section 1021(*b*), which states that "for the purposes of the appeal", witnesses may be examined before the court. It is obviously in order to enable the court to properly determine the case, that such a power is conferred, and these plain words used by the legislator must be given effect to. Otherwise, the section would be nugatory, and Parliament's expressed intentions would be defeated.

This section corresponds substantially to section 9(*b*) of the English Criminal Appeal Act 1907. It has been held in England that this authority to hear new evidence must be used with "great care" and in "exceptional circumstances" only, and I think that the rule here is the same. (*Rex* v. *Mason*) (1); (*Rex* v. *Rowland*) (2). A too liberal exercise of this power would undoubtedly conflict with the economy of our criminal law, would in certain instances give the Crown a second chance to make a case which it has failed to make at trial, and could possibly also invest a court of appeal with powers exclusively within the province of the jury.

(1) 17 C.A.R. 160. (2) 32 C.A.R. 29.

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But in the case at bar, in view of the special circumstances, I think that the Court of Appeal was right in granting the application made by the Crown to hear the analysts. The accuracy of the facts contained in the certificates were not an issue before the jury, and all parties seemed to agree that the drug had been properly proved. Although the failure of counsel for the defence to object to illegal evidence, cannot as a rule be considered as fatal, it is important to note in the present case, that he declined to cross-examine one of the analysts who was present at the trial, and offered by the Crown. The Court of Appeal merely corrected an error upon which the jury acted, and as Dysart J. said, it has put the case in exactly the position in which the jury believed it to be, when they convicted the accused.

Under section 1014, Cr. Code, the Court of Appeal could confirm or order a new trial, and I think that it followed the proper course in adopting the former. The fresh evidence was in its nature conclusive and did not reveal new facts that might influence a jury in coming to a conclusion.

I would dismiss the appeals.

ESTEY J.:—The appellants, whose conviction for conspiracy contrary to s. 573 of the *Criminal Code* was affirmed by the Court of Appeal for Manitoba (1), have, by way of a further appeal, been granted leave, under s. 1025 of the *Criminal Code* as amended in 1948 (S. of C. 1948, c. 39, s. 42), to submit two questions of law to this Court:

"(1) On the Appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021 (1) (*b*) of the Criminal Code or otherwise to allow the Respondent to produce before that Court the oral evidence actually given?

(2) If so, was that Court empowered, on such evidence taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?"

These appellants were charged upon four counts of conspiracy to unlawfully (*a*) sell, (*b*) possess, (*c*) cause to be taken and (*d*) distribute, drugs within the meaning of

(1) 59 M.R. 86; 100 Can. C.C. 130.

The Opium and Narcotic Drug Act, 1929, and thereby to have committed an offence contrary to the provisions of s. 573 of the *Criminal Code*. At their trial before a judge and jury they were found guilty of (*a*), (*b*) and (*c*).

The Crown established the conspiracy by adducing evidence of specific instances of selling, possessing and causing to be taken, drugs contrary to *The Opium and Narcotic Drug Act*. As proof of the fact that the commodity dealt with in each instance was a narcotic drug, ten certificates of analysis were placed in evidence without objection. Counsel for the Crown, in tendering these certificates, was under the impression that they were admissible by virtue of the provisions of s. 18 of *The Opium and Narcotic Drug Act*. This impression was concurred in by the learned trial judge. S. 18 reads as follows:

> 18. In any prosecution under this Act a certificate as to the analysis of any drug or drugs signed or purporting to be signed by a Dominion or provincial analyst shall be *prima facie* evidence of the facts stated in such certificate and conclusive evidence of the authority of the person giving or making the same without any proof of appointment or signature.

The learned judges in the Court of Appeal held that the provisions of s. 18 had no application to a trial for conspiracy under s. 573 of the *Criminal Code* and that the ten certificates prepared by the analysts were improperly received. The learned judges, however, were of the opinion that this was an appropriate case in which to hear *viva voce* evidence of the analysts under the authority of s. 1021(1) (*b*) of the *Criminal Code*:

> 1021. For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interest of justice.
>
> . . .
>
> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal; . . .
>
> and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the court of appeal.

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Messrs. Jones and Blanchard, who had prepared these certificates, were accordingly called as witnesses before the Court of Appeal and there gave evidence to the same effect as set out in their respective certificates.

S. 1021(1) (*b*) was enacted by Parliament in 1923 and is to the same effect as s. 9(*b*) of the Court of Criminal Appeal Act in Great Britain (1907, 7 Edw. VII, c. 23). In the Court of Criminal Appeal the corresponding English s. 9(*b*) was commented upon as follows:

> Undoubtedly the Legislature has armed this Court with the widest possible powers for the purposes of investigation, and in a proper case this Court would not refuse to make use of the powers which are contained in these paragraphs of s. 9.

Rex v. *Thorne* (1).

Parliament has indicated what is "a proper case" by expressly providing that the wide powers under s. 1021(1) (*b*) shall be exercised only where the court of appeal "thinks it necessary or expedient in the interest of justice." Under this provision it has been repeatedly held, as stated by the learned author of Archibald's Cr. Pl., Ev. & P., 32nd Ed., p. 309, that

> The Court will only act upon this power in very special circumstances.

which, as pointed out by the Lord Chief Justice in *Rex* v. *Weisz* (2), "they had been careful not to define." A similar view is expressed in *Rex* v. *MacTemple* (3). It, therefore, appears that if a court of appeal has concluded that the circumstances are exceptional and directed the reception of the evidence its decision should not be disturbed, unless, in arriving at its conclusion, it has acted contrary to principle.

The learned judges of the Court of Appeal deemed the circumstances here sufficiently special that, in the interest of justice, the evidence of the analysts should be heard. It is an unusual case. Apart from a statutory provision, such evidence as we are here concerned with can only be received *viva voce*. S. 18 is enacted as part of, and is applicable only "in any prosecution under," *The Opium and Narcotic Drug Act*. Such a provision has no application to a prosecution for an offence under s. 573 of the *Criminal Code*. In so far as *Desrochers* v. *The King* (4),

(1) (1925) 18 C.A.R. 186 at 187.
(2) (1920) 15 C.A.R. 85 at 87.
(3) [1935] 3 D.L.R. 436.
(4) 69 Can. C.C. 322.

may be contrary to this view, it must be overruled. S. 28 of the *Interpretation Act* (R.S.C. 1927, c. 1), which makes certain provisions of the *Criminal Code* applicable to other statutes, does not make the provisions of those other statutes applicable to prosecutions under the *Criminal Code* and, therefore, does not assist the prosecution upon this appeal.

We were informed that these certificates were placed in evidence at the preliminary without objection. Then, when counsel for the Crown, prior to the trial, decided that it was unnecessary for him to call all the witnesses who could depose to the relevant facts, he prepared a list of these, together with a summary of their evidence, and submitted it to counsel for the appellant, with a request that if he desired any of these witnesses to be called for the purpose of cross-examination that he so advise him. This list included Jones, one of the analysts, who had prepared some of these certificates. Counsel for the appellant replied that he desired that only one Porter, whose evidence was not upon any question relative to the analysis of the commodities, be alone produced for cross-examination. All of this was explained before the presiding judge and appears in the record of the trial, in part, as follows:

THE COURT: Your answer is, you don't wish him to call any except Porter?

Mr. KUSHNER: I don't wish any witness called for the purpose of cross-examination, other than Inspector Porter.

The failure of counsel for the defence to object to the reception of inadmissible evidence does not, in general, constitute a bar to the objection thereto in an appellate court, nor would it alone justify a court of appeal in exercising its powers under s. 1021(1) (*b*). It is, however, an important circumstance in this case because it corroborates what was evidenced throughout the trial that the main contentions of the defence were not directed to whether the substances were narcotic drugs within the meaning of *The Opium and Narcotic Drug Act*. In *Stirland* v. *Director of Public Prosecutions* (1), Viscount Simon stated:

. . . the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced.

(1) [1944] A.C. 315 at 328.

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Even if the certificates had been admissible under s. 18, they were only *prima facie* evidence of their contents and if counsel for the appellant had intended to raise any question as to their correctness or the weight of the statements contained therein he would have, upon receipt of the request from counsel for the Crown, asked that at least Jones be called for cross-examination.

The certificates, though inadmissible, were received at and accepted throughout the trial as evidence of the facts therein set out. The Court of Appeal, under s. 1021(1) (*b*), permitted these facts to be placed in evidence by the calling of the witnesses Jones and Blanchard, who had made the analyses and prepared the certificates and who deposed to the same facts as set out in the certificates. In effect, the same facts are now repeated in the record, but in a form admissible in law. Under these circumstances the Court of Appeal, in concluding, in the interests of justice, that the additional evidence should be received, has violated no principle and has acted within its power under s. 1021(1) (*b*).

The contention of counsel for the appellant that the Court of Appeal had no power to receive the evidence of Jones and Blanchard, because in neither case was the evidence "newly discovered" or "new evidence" unknown to the Crown at the time of the trial, is not tenable. In support of his contention he cited a statement of Lord Chief Justice Goddard in *Rex* v. *McGrath* (1), which had reference to the disposition of the case when previously before the court and was not essential to the decision of the case which was now before the court upon a reference by the Secretary of State under s. 19(*a*), where, as pointed out in *Rex* v. *Collins* (2), different considerations obtain. Moreover, counsel, in his submission, would construe s. 1021(1) (*b*) as equivalent to the rule in civil cases for the granting of a new trial and the reception of further evidence. The language of s. 1021(1) (*b*) does not support this submission. The incorporation of the reference to "appeals in civil matters" follows and is in addition, or supplementary, to the powers set out in subpara. (*b*) of

(1) [1949] 2 All E.R. 495 at 497. (2) 34 C.A.R. 146.

1021(1). Moreover, neither in England nor in Canada has this provision been so construed. *Rex* v. *Dutt* (1); *Rex* v. *Warren* (2); *Rex* v. *Hullett* (3); *Rex* v. *Allaway* (4); *Rex* v. *Ward* (5); *Rex* v. *Mason* (6); *Rex* v. *Knox* (7); *Rex* v. *MacTemple* (8); *Rex* v. *Buckle* (9).

The further submission of counsel for the appellant, that the provisions of s. 1021(1) (*b*) are applicable only in support of an appellant who seeks to set aside a verdict of guilty, is not tenable. The comprehensive language of the section is such as to make it applicable to both the defence and the Crown and had Parliament intended any such limitation as here suggested it would have adopted apt language to give expression thereto. Moreover, in *Rex* v. *Robinson* (10), where the accused appealed, the Crown was granted leave to call further evidence. The facts of the case are quite different, but it does support the view that the provisions of the section are available to the Crown as well as the defence. The section, as already stated, gives wide powers to a court of appeal, to be exercised only where that court properly concludes that the evidence should be received in the interest of justice.

The second question assumes the power of the court of appeal to hear the evidence, but suggests that, having done so, it is authorized merely to order a new trial. There does not appear to be, nor was our attention directed to, any provision in s. 1021(1) (*b*), or elsewhere, to the effect that the reception of evidence under that section by a court of appeal limits or restricts that court in its disposition of the appeal under s. 1014. On the contrary, the relevant provisions of the Criminal Code rather contemplate that the evidence so received shall form a part of the record and be considered along with the evidence taken at the trial. If the court of appeal finds that there are reasons within s. 1014(1) (*a*), (*b*) and (*c*) to allow the appeal, it will do so, but, if not, then under s. 1014(1) (*d*) it will dismiss the appeal. The Court of Appeal was of the opinion that this case did not come under s. 1014(1) (*a*),

(1) 8 C.A.R. 51.
(2) 14 C.A.R. 4.
(3) 17 C.A.R. 8.
(4) 17 C.A.R. 15.
(5) 17 C.A.R. 65.
(6) 17 C.A.R. 160.
(7) 20 C.A.R. 96.
(8) [1935] 3 D.L.R. 436.
(9) [1949] 7 C.R. 485.
(10) 12 C.A.R. 226.

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(*b*) or (*c*), but under s. 1014(1) (*d*), and, therefore, dismissed the appeal. Dysart J.A., speaking on behalf of the Court, stated:

> In the present case the fresh evidence is as nearly conclusive as oral testimony can be. It is directed to only one point—the scientific analysis of the material which the prosecution charges was a narcotic drug; and it proves beyond any doubt that the material was a narcotic within the meaning of the Opium and Narcotic Drug Act. The evidence is of highly competent analysts; it has no internal weakness or defect, and is not contradicted nor challenged by any other evidence in the case.

This evidence was to precisely the same effect as the facts set forth in the certificates. In cross-examination the witnesses were asked as to the possibility of mistake or error, but their answers were such that this contention was not pressed. What was attained by the calling of these witnesses was the placing in the record, in a form admissible as evidence, facts which erroneously had been treated as properly before the court at the trial. As such, they were passed upon by the jury. In effect, it was, therefore, a change in form rather than substance upon an issue in respect of which contentions were not raised at the trial. No reason is suggested why a jury, acting judicially, would not have come to the same conclusion.

In my opinion the judgment of the Court of Appeal should be affirmed and the appeal dismissed.

LOCKE J.:—The charge against the appellants in respect to the offence of conspiring to sell narcotic drugs was:

> That they, the said John Kissick, Peter Kissick, William Kissick and Stella (Sally) Smallwood . . . conspired with each other and with other persons unknown to commit an indictable offence, to wit: to unlawfully sell drugs, within the meaning of the Opium and Narcotic Drug Act, 1929, and amendments thereto, without first having obtained a licence from the Minister of National Health and Welfare or other lawful authority.

The charges as to the offences of possessing, carrying and distributing narcotic drugs were expressed in similar terms.

The offences created by section 4 of the *Opium and Narcotic Drug Act 1929* are indictable. Section 573 of the *Criminal Code* provides that:

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

and it was under this section of the *Code* that these proceedings were taken.

Section 18 of the *Opium and Narcotic Drug Act* provides that:

> In any prosecution under this Act a certificate as to the analysis of any drug or drugs signed or purporting to be signed by a Dominion or provincial analyst shall be *prima facie* evidence of the facts stated in such certificate and conclusive evidence of the authority of the person giving or making the same without any proof of appointment or signature.

On the assumption that this section might be invoked in a prosecution for conspiracy, ten certificates, certain of which were signed by J. B. Jones and others by J. F. Blanchard, both Dominion analysts, were tendered and received in evidence at the trial as proof of the fact that the drugs said to have been sold by certain of the appellants were substances mentioned in the schedule to the *Act*. Neither of the analysts gave oral evidence. In advance of the hearing, however, counsel for the Crown had advised counsel for the accused that there were eleven witnesses whose evidence would be merely corroborative, these including the name of the analyst Jones, whom the Crown did not propose to call, unless the defence wished any of them to be called for the purpose of cross-examination, and was advised that they did not wish Jones and others to be called for this purpose. The name of Blanchard was not included in the list. In charging the jury Mr. Justice Montague instructed them that they were to give full credence to the certificates and that the facts stated in them were to be taken as "proven conclusively" and no objection was made by counsel for any of the prisoners to this or any other portion of the charge. The learned trial judge directed the jury to acquit the appellants of the fourth of the charges, namely, that of conspiring to distribute narcotic drugs, and of the three other charges they were all found guilty and sentenced to various terms of imprisonment.

The present appellants appealed to the Court of Appeal for Manitoba (1), serving their notice on the day they were sentenced and raising amongst other grounds the contention that the certificates were inadmissible, since the prosecution was not under the *Opium and Narcotic Drug Act*. During the hearing of the appeal counsel for the

(1) 59 M.R. 86; 100 Can. C.C. 130.

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Crown applied for leave to adduce oral evidence in support of the conviction and orders were made that the evidence of the analyst Jones be taken before the Court of Appeal, and that of the analyst Blanchard, who was ill at the time, before Mr. Justice Adamson. The accused disclaimed any wish to be present during these proceedings but they were represented by counsel who cross-examined the witnesses on their behalf. In the result the convictions were affirmed and the appeals dismissed.

The present appeal has been taken pursuant to special leave granted by Kerwin J. and by whose order the questions of law to be determined are thus stated:

"1. On the appellants' appeal from their conviction was the Court of Appeal for Manitoba empowered under sections 1014 and 1021(1) (*b*) of the Criminal Code, or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

2. If so, was that Court empowered on such evidence, taken in conjunction with that given at the trial, to affirm the conviction, or was it authorized merely to order a new trial?"

Section 1013 of the *Criminal Code* grants a right of appeal to the Court of Appeal to a person convicted on indictment in certain defined circumstances, and subsection 4 of that section, introduced into the *Act* in 1930, allows an appeal by the Crown from a verdict of acqittal on any ground of appeal which involves a question of law alone. The powers of the Court for disposing of such appeals are defined by section 1014. Section 1021 provides in part as follows:

> For the purposes of an appeal under this Part, the court of appeal may if it thinks it necessary or expedient in the interests of justice,
>
> . . .
>
> (*b*) if it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the court of appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose, and allow the admission of any deposition so taken as evidence before the court of appeal;
>
> and exercise in relation to the proceedings of the court of appeal any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters, . . .

By the *Court of Appeal Act,* c. 40, R.S.M. 1940, section 27, it is provided that the court upon any appeal, may give any judgment which ought to have been pronounced and make such further or other order as is deemed just, and by subsection 3 that:

> the Court shall have full discretionary power to receive further evidence upon questions of fact by oral examination in court, by affidavit, or by declaration taken before an examiner or a commissioner.

The judgment of the Court of Appeal proceeded on the basis that the certificates of the analysts were not admissible in evidence and the application made on behalf of the Crown would indicate that this position was accepted by counsel on its behalf. On the argument before us, however, counsel for the Crown contended that section 18 of the *Opium and Narcotic Drug Act, 1929,* applied to a prosecution such as this and that accordingly the facts disclosed in the certificates of analysis were proven. If this contention could be sustained, it would, of course, be unnecessary to deal with either of the questions submitted. In my opinion, the certificates were not admissible and the fact that the substances dealt in by the appellants were narcotic drugs, within the meaning of the *Act,* was not proven. The offence for which the accused were indicted was not that of committing any of the offences enumerated in the *Act* of which section 18 forms a part, but rather the offence of conspiring with others to commit such an offence, a conspiracy declared to be indictable by section 573 of the *Criminal Code.* The opening words of section 18 are "in any prosecution under this Act" and there could be no prosecution under that *Act* for acts declared to be an offence by a section of the *Criminal Code* and not elsewhere in any statute relating to the criminal law. To invoke section 18 of the *Opium and Narcotic Drug Act* in a prosecution such as this would be to import a section of that *Act* into the *Criminal Code,* and for this I find no warrant anywhere.

In ordering the taking of further evidence the Court of Appeal has acted in the exercise of the discretion vested in it by section 1021 and the determination of the first question requires us to decide whether, in so doing, it has acted upon the proper principle (*Brown* v. *Dean*) (1). The relevant portions of section 1021, while not verbatim, are

(1) [1910] A.C. 373 at 375.

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indistinguishable from the corresponding portions of section 9 of the *Criminal Appeal Act 1907* of England. There it may be noted the court is not empowered to order a new trial. In *Rex* v. *Mason* (1) 17 C.A.R. 161, Darling J., in delivering the judgment of the court on an application to adduce further evidence, said in part:

> It is now really asked that there should be a new trial, which this Court is not empowered to order, and that we should hear certain witnesses whose names have been mentioned, and then consider the whole of the trial in the light of that new evidence. This Court exercises with very great caution the power given it to hear fresh evidence because to do so is opposed to the old established, trusted and cherished institution of trial by jury. This Court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence which has not been laid before the jury, and which, in some cases, might have been put before the jury at the trial.

As to the evidence of proposed witnesses who were available but not called at the trial, to the same effect is the judgment of that court in *Rex* v. *Hatch* (2). In some cases such as *Rex* v. *Warren* (3), where the witness was not called at the trial, due to a misunderstanding, evidence has been received in the Court of Appeal but where, as in *Rex* v. *Weisz* (4), on the appeal of the prisoner an application was made to give the evidence of a woman who had been absent from England at the time of the trial, Reading C.J., in refusing the application, said that the appellant's legal advisers knew the case they would have to meet and no application was made to adjourn the trial, that there was no surprise and that the policy was deliberate of resting the defence upon the available evidence. These were all cases where the appellant was the prisoner but in *Rex* v. *Robinson* (5), where a prisoner applied for leave to appeal, the Crown asked leave to put in further evidence, being a letter written by the prisoner since his conviction in which he admitted committing the offence, and this was permitted under the provisions of section 9 of the Act.

In *Rex* v. *Collins* (6), further evidence was received on the appeal because the reference had been made to the court by the Home Secretary who wanted the court to deal with it, but Goddard L.C.J. pointed out the risk of allowing

(1) 17 C.A.R. 161.
(2) 20 C.A.R. 161.
(3) 14 C.A.R. 4.
(4) 15 C.A.R. 85.
(5) 12 C.A.R. 226.
(6) 34 C.A.R. 146.

such evidence after conviction and the reason why it is not done, save in exceptional circumstances, in these terms:

> The danger of allowing further evidence to be called after conviction, and the reason why the Court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing. If further evidence were allowed in such circumstances, it could always be said: "If this evidence had been given at the trial, it does not follow that the jury would have convicted, or they might not have convicted." That is especially true in cases where the defence is an alibi. Two or three witnesses perhaps are called to establish an alibi, which the jury reject. It is very often not difficult after conviction to find another witness or perhaps two more witnesses who would be willing to come and support the alibi, and it can always be said: "If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility." That is one of the reasons why this Court is necessarily reluctant to allow further evidence to be called after conviction.

Some further light on the construction which has been placed upon the English Statute by the court is afforded by the judgment in *Rex* v. *Rowland* (1), where, on an appeal against a conviction on a charge of murder, an application was made on behalf of the appellant for leave to call as a witness a man who, since the trial of the appellant, confessed that he himself had committed the murder of which the appellant had been convicted. Humphreys J., delivering the judgment of the court, after pointing out that to permit this would involve an inquiry of a totally different character from the simple issue involved in the calling of a fresh witness to speak to some fact connected with the defence put forward at the trial and in effect engage the court in trying not only the accused but also the man who wished to confess to committing the crime, said in part (p. 462):

> Now the court has in truth no power to try anyone upon any charge. It is not a tribunal of fact but a court of appeal constituted by statute to examine into the proceedings of inferior courts in certain cases of conviction or indictment. We have no power even to direct a new trial by a jury; much less have we the right to conduct one ourselves.

These general statements of the principles to be followed in hearing such appeals in England, while indicating generally the reluctance of the court to hear further evidence except under exceptional circumstances, do not touch the exact point to be determined here where there was, in my opinion, no sufficient evidence of a matter essential to the

(1) [1947] 1 K.B. 460.

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validity of the convictions, and counsel for the Crown seeks to remedy the defect on the prisoners' appeal to the Court of Appeal. If the application had been to give further evidence on the ground that its existence had been discovered since the trial and the issue upon which the evidence was tendered was controversial, the principles stated in the judgment of the Judicial Committee in *Hosking* v. *Terry* (1) and in the judgment of this Court in *Varette* v. *Sainsbury* (2), would apply. In the view I take of the matter, however, these principles are inapplicable in the circumstances of the present case.

Section 1021 does not restrict the power of the Court of Appeal to permit further evidence to be given before it to cases where the applicant is the appellant, but permits its admission also at the instance of the respondent if, in the circumstances of the case, it is considered that to do so is necessary or expedient in the interests of justice. If the evidence sought to be introduced on the hearing of the appeal touch upon an issue which is controversial, involving a consideration of the weight to be given to the evidence, the court of appeal would be involved, as pointed out by Humphreys J. in *Rowland's* case, in conducting a trial, and to do this, in my opinion, is outside of anything contemplated by section 1021.

The reasons for judgment delivered on the application to take the further evidence direct attention to the fact that, while all of the accused were represented by counsel, no objection was made to the admission of the certificates at the time they were offered in evidence, nor was the objection raised on the argument of the motion made on behalf of the accused at the conclusion of the Crown's case for a directed verdict of not guilty, nor after the judge's charge in which he had instructed the jury that the certificates were to be accepted as proof of the facts stated in them. From the fact that the appellants were found guilty on October 25, 1950, and were sentenced on the following morning, and that the notices of appeal were given on the same day raising the objection to the admissibility of the certificates, an inference might be drawn that the failure

(1) (1862) 15 Moo. P.C. 493 at 504. (2) [1928] S.C.R. 72 at 76.

to object at the trial was deliberate. In *Rex* v. *Sanders* (1), where copies of letters were introduced into the evidence by the Crown without objection and where the prisoners were represented by counsel, Bray J. said that the objection ought to have been taken at the time and, as it was not then taken, it could not be entertained by the court. That this statement cannot be taken without qualification appears from the judgment in *Stirland* v. *Director of Public Prosecutions* (2), where Viscount Simon, L.C. said in part:

> No doubt, as was said in the same case (*Rex* v. *Ellis* (1910) 2 K.B. 746,764), the court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal, but where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice.

It is not the law, in my opinion, that the failure of counsel for a prisoner to object to the admission of evidence is in all circumstances fatal to an appeal taken on the ground that the evidence has been improperly admitted. If it be assumed that in these circumstances the objection may still properly be raised, the course adopted by counsel on behalf of the appellants has made manifest that they did not consider the fact that the drugs were of the nature referred to in the schedule to the *Opium and Narcotic Drug Act* was open to dispute and did not intend to tender evidence to dispute it. The accuracy of the evidence given in the Court of Appeal was not open to question and where it is clear that there had been no intention on the part of the accused persons to dispute the facts shown, I am unable to perceive any principle of law governing the exercise of the discretion vested in the court which has been infringed by receiving it. In my opinion, the answer to the first question should be in the affirmative.

Section 1021 permits the taking of further evidence "for the purposes of an appeal under this part." I see no ambiguity in this language nor anything in the section or elsewhere in the sections relating to criminal appeals restricting, or indicating any intention of restricting the

(1) 14 C.A.R. 9.

(2) [1944] A.C. 315, 328.

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effect to be given by the court to the further evidence in exercising its powers under section 1014. I respectfully agree with Mr. Justice Dysart that the evidence given before the Court of Appeal in this matter is as nearly conclusive as oral testimony can be and that it was within the powers of the Court to affirm the conviction and dismiss the appeals.

I would dismiss these appeals.

FAUTEUX J.:—At the Summer Assizes of the Court of King's Bench, held in the Eastern Judicial District, Province of Manitoba, the appellants were jointly tried, and on the 25th of October 1950, found guilty on three counts of conspiracy, i.e., conspiracy (*a*) to possess, (*b*) to sell, and (*c*) to cause to be carried in Canada, without first having obtained a licence from the Minister of National Health and Welfare, or other lawful authority, drugs within the meaning of the *Opium and Narcotic Drug Act.*

Each of the appellants entered an appeal (1) against these convictions, raising *inter alia,* the following points: beyond the *prima facie* proof, resulting from the production of several certificates of analysis, it was argued that there was no evidence establishing that the drugs referred to therein were drugs within the meaning of the *Act,* and that such certificates, admissible as such proof on a charge of actual possession, sale or transport, were inadmissible on a charge of conspiracy to possess, sell or transport. These contentions eventually turned out to be those on which the appeal fell to be determined. During the hearing, without acceding to the appellants' views, the respondent, nonetheless, applied for and obtained permission of the Court of Appeal—under section 1021 of the *Criminal Code*—to take and introduce in the record, the oral evidence of the two Dominion analysts who had issued these certificates filed at trial. The new evidence having been taken and considered, the appeals were dismissed.

Thereupon and pursuant to an application made under section 1025(1) of the *Code,* the appellants applied for and

(1) 59 M.R. 86; 100 Can. C.C. 130.

obtained leave to appeal to this Court on the following questions of law:

(1) Was the Court of Appeal empowered under section 1014 and 1021(1) and (*b*) of the *Code* or otherwise, to allow the respondent to produce before that Court the oral evidence actually given?

(2) If so, was the Court empowered on such evidence taken in conjunction with that given at the trial, to affirm the conviction or was it authorized merely to order a new trial?

In my view, it does not appear necessary, for the proper determination of this appeal, to deal with these two questions. For, while the additional evidence, introduced in appeal, might serve to confirm the conviction that there was no substantial wrong or miscarriage of justice in the premises, I have reached the conclusion that such evidence was not essential to legally support the verdict rendered. In my view, as I propose to show, the certificates of analysis were, in this prosecution, admissible evidence of the facts therein stated and, in any event, the record discloses that the defence, at trial, either chose—as it was, by law, entitled —not to hold the Crown to strict proof with respect to this particular issue, or else, opted to attempt to preserve a ground of objection for a possible appeal.

As to the admissibility of the certificates of analysis, Section 18 of the *Opium and Narcotic Drug Act*—hereinafter referred to as the Act—is the relevant section. The opening words of the English and French versions governing its operation must be quoted:

> In any prosecution under this Act . . . Dans toute poursuite sous le régime de la présente loi . . .

The adequate interpretation of these opening words cannot legally be gained by merely considering them only within the narrow compass of the section, or even of the *Act* in which they are found. It must rather be gathered in the full light of the relevant provisions of the *Interpretation Act*, particularly sections 15 and 28. The true import of section 15 was recently considered in *Robinson or Robertson* v. *The King* (1), particularly at pages 529, 530. Section 28 was equally considered by this Court in *Simcovitch* v. *The King* (2). In that case, Sir Lyman Duff, applying

(1) [1951] S.C.R. 522. (2) [1935] S.C.R. 26.

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the provisions of the latter section to section 191 of the *Bankruptcy Act*, under which the appellants were prosecuted, said that section 191 must be read and construed on the footing that the provisions of the *Criminal Code* apply to the offences created by it. The same principle must prevail as to the *Opium and Narcotic Drug Act* and so must its provisions, creating offences, be read and construed.

In this broader view, the following may be said. The opening words of section 18 are, on one hand, quite adequate to prevent the application of the section in the case of a prosecution entirely foreign to the *Act*, e.g. one exclusively under the *Code*. Thus, if a person sells a quantity of drugs, falsely representing them to be heroin, and obtains thereby a sum of money, the Crown could not, on a prosecution under section 405 of the *Criminal Code*, prove by means of a certificate of a Dominion analyst, the nature of the drugs sold, for this would not be a prosecution authorized under the *Act*. I cannot, however, convince myself that the all-embracing meaning of the language "In any prosecution under this Act", would be apt to include within the operation of section 18, prosecutions of offences nominally mentioned in the Act—such as the sale of drugs—and at the same time, be apt to exclude from its operation prosecutions of the other offences—such as counselling or conspiring to sell drugs—which Parliament by, and only by, the very same provision in the *Act*, virtually created and, therefore, rendered subject to prosecution. By force of section 28, in making the sale of drugs an offence, Parliament effectively thereby made the counselling of a sale, or the conspiracy to sell drugs, offences, and authorized by the *Act* itself, in each case, a prosecution. The prosecution of any of these offences is, in my view, a prosecution under the *Act*. The opening words of section 18 are not "In any prosecution for an offence under the Act", but "In any prosecution under the Act".

In *Desrochers* v. *The King* (1), a case which was not quoted before the Manitoba Court of Appeal nor on the application for leave to appeal to this Court, the Court of Appeal of the Province of Quebec has, on a charge of conspiracy to commit an offence under the *Excise Act*, admitted as evidence the certificate of analysis authorized under the

(1) 69 Can. C.C. 322.

latter *Act* in terms similar to those of section 18. This decision, rendered in 1937, was always followed in the Province of Quebec.

I do not find it necessary, however, to discuss this point any further, for the following reason, which led me to the conclusion that the additional evidence, introduced in appeal, was unessential to legally support the verdict rendered by the jury, is by itself sufficient.

As indicated above, the record in this case discloses the following facts: Defence counsel at trial entirely and consistently refrained from making any objection when these certificates—twelve in number—were filed by the Crown; properly notified, pursuant to a local practice, of the actual presence in Court of one of the Dominion analysts, who had issued some of them, and that, if heard, his testimony would bear on the facts therein appearing, counsel for the defence not only refrained from taking advantage of the opportunity to cross-examine him but positively indicated the intention not to do so; at the close of the evidence for the prosecution, a motion for non suit was made on behalf of the appellants, but the point as to the admissibility of the certificates was not even mentioned; the appellants were not heard at trial, nor was there any evidence adduced by the defence, nor was there any attempt to assail the facts mentioned in the certificates.

At the close of the judge's address, several objections were made by counsel for the defence; but, again, and though the judge had, in plain terms, instructed the jury that the certificates were positive evidence of the facts they mentioned, nothing was said, in this respect, by the defence. The verdict was rendered late on the afternoon of the 25th and the sentence imposed in the forenoon of the 26th and, on the same day, the notice of appeal which was served revealed, for the first time, this ground for complaint.

A large discretion is given to counsel in the conduct of the defence. Particularly, and under section 978 of the *Criminal Code*, it was open to counsel to make any admission as to any of the issues which the Crown had to prove as part of its case. Likewise, and in respect to the relevant issue, the defence had the discretion not to hold the Crown to strict legal proof. In my view, the whole conduct of

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the defence, in this case, manifested at trial a positive intention to accept the certificates as sufficient evidence of the facts therein stated, and to disregard them as one of the issues on which the case was fought, by the accused, represented by counsel.

In *Davis and Ridley* (1), Darling J., as he then was, said at page 139:

> It is stated that in opening the case, counsel for the prosecution stated matters which were not evidence against the appellant Davis on his trial, but we have been unable to find the admission of any evidence that could be objected to; but if it were so, if counsel on the other side do not object, it is not obligatory on the judge to do so. When a prisoner is defended by counsel and he chooses, *for reasons of his own,* to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground.

In *The King* v. *Sanders* (2), the accused was charged with obtaining money by false pretences. During his opening speech, counsel for the prosecution proposed to read copies of letters alleged to have been written to the appellant by the prosecutor's wife and solicitor. As no notice to produce the original letters had been given to the defence, objection was taken and maintained as to the reading of such copies. However and in the course of the examination of the complainant by the Crown, these copies were admitted in evidence without any objection from counsel for the defence. The accused having been convicted, appealed on the ground that the copies of the letters were wrongly admitted. The judgment of the Court (Bray, Avory and Sankey, JJ.) was delivered by Bray J. At page 553, Bray J. said:

> In our opinion, if it was intended to rely on this point, the objection should have been repeated at the time the evidence was tendered, and not having been taken then, it cannot now be taken in this Court, at all events, when the prisoner was represented by counsel.

Said Viscount Simon in *Stirland* v. *The Director of Public Prosecutions* (3).

> There is no universal rule that a conviction cannot be quashed on the ground of the improper admission of evidence prejudicial to the prisoner unless an application is made at the time by counsel for the prisoner for the trial to begin again before another jury. It has been said more than once that a judge when trying a case should not wait for objection to be taken to the admissibility of the evidence but should stop such questions himself. If that be the judge's duty it can hardly be fatal

(1) 2 C.A.R. 133.
(2) [1919] 1 K.B. 550.
(3) 30 C.A.R. 40.

to an appeal founded on the admission of an improper question that counsel failed at the time to raise the matter. No doubt the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really "prejudiced." It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal.

These authorities are sufficient to support the proposition that, as to the consequences of the failure to object, there is no steadfast rule, and that, while the failure to object to inadmissible evidence is not always fatal, it cannot be said that it is never so.

Indeed, as stated by Lord Sankey in *Maxwell* v. *Director of Public Prosecutions* (1):

. . . the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction *may* be quashed.

In the present case, however, the record, as indicated above, discloses more than a mere omission to object, as it shows a consistent conduct in this respect and a clear and positive intention not to deal with this particular point as being one in controversy in the case.

It might be, as it was intimated, that the defence acted in this way to preserve a possible ground of appeal; if so, the open conduct of the defence sufficiently defeats such a purpose, to which I would not find it consonant with the due administration of justice, to give effect.

With all these circumstances, there was, in the premises, no principle involved, no substantial wrong or miscarriage of justice.

The appeal, in each case, should be dismissed.

Appeals dismissed.

Solicitors for the appellants: *C. N. Kushner and Harry Walsh.*

Solicitor for the respondent: *Hon. C. Rhodes Smith.*

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(1) 24 C.A.R. 152 at 176.

1951
*Nov. 8, 9.
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*Feb. 5.

MÉDÉRIC PARENT (DEFENDANT).....APPELLANT;

AND

EMMANUEL LAPOINTE (PLAINTIFF)....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Automobile—Negligence—Car left the road—Burden of proof on driver to explain accident—Joint venture—Mandate—Whether aggravation of a sickness actionable—Art 1710 C.C.

A car driven at night by the appellant left the road and after turning over several times stopped in a field about 50 feet from the highway. The road was in a good condition; the appellant was driving between 40 and 50 miles per hour and says that he probably dropped suddenly into sleep. There was no evidence of any other fact or circumstance that would point to any other cause. The action taken by the respondent, who as a passenger was severely injured, was dismissed by the trial judge but maintained by the Court of Appeal for Quebec.

Held: The appeal should be dismissed and the cross-appeal on the amount of damages allowed.

Held: The appellant had the onus of establishing that the accident which, but for his negligence, should not have happened in the normal course of things, was caused by an extrinsic fact for which he could not be held responsible. Not only has he failed to show any such element to justify the Court to find that the accident was due to a cause out of his control, but he admitted that he probably fell asleep—which would be a fault. (*Scott* v. *St. Katherine Docks* (1865) 3 H. & C. 596; *Ottawa Electric Co.* v. *Crepin* [1931] S.C.R. 407 and *Demers* v. *Demers* Q.R. (1931) 37 R. de J. 161 referred to).

Held, also: In the circumstances of this case, the driver's liability was not negatived by the so-called joint venture arising from the fact that the passengers and the driver were going on a shooting trip by automobile, all the expenses, including the cost of the gasoline and oil for the automobile, being borne equally: there was no acceptance of the risk of the culpable act nor renunciation to the right to claim damages resulting from the negligence of the driver. Even if there had been a mandate—which is doubtful—the driver's fault could not be excused under Art. 1710 C.C.

Held further: There being a relation *causa causans* between the accident and the respondent's subsequent hospitalization for tuberculosis, the respondent is not barred from claiming compensation for that by the fact that he had before the accident tuberculosis in a latent state. Any aggravation of a sickness caused by an accident can be the subject of an action in indemnity against the author of the quasi-delict.

APPEAL and CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1) reversing the decision of the trial judge and maintaining the action.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Locke and Fauteux JJ.

(1) Q.R. [1951] K.B. 299.

Jacques de Billy, K.C., for the appellant. There is no presumption in favour of the plaintiff, who was a gratuitous passenger. He had the onus of proving the cause of the accident and that such cause was due to the fault, negligence and carelessness of the appellant. Nobody can say how the accident happened. The plaintiff has not discharged that onus and has not proved how the accident happened. He only proved that the appellant lost control of his car, which is not sufficient to condemn him or even create a presumption of fact against him. The control can be lost for a number of reasons which cannot be blamed on the driver. Loss of control is not a fault or indicative of fault. It cannot be sufficient in an action against a driver to allege that he has lost control of his car without mentioning any fault. (*McKenzie* v. *Meyers* (1), *Perusse* v. *Stafford* (2), *Lacombe* v. *Power* (3) and *McLean* v. *Pettigrew* (4)).

The appellant admits the possibility of his having gone to sleep, but he recalls nothing. The only duty that the driver owed to his passengers was not to do anything negligently and falling asleep in the circumstances of this case was not a fault. *Parent & Colonial* v. *Garneau* (5). However, it was not proved that the accident was due to the appellant going to sleep at the wheel. And even if that had been proved, since the evidence proved that he went to sleep suddenly without forewarning, there would be no responsibility (*Lajimondiere* v. *Pritchard & Duff* (6)). There was no negligence for him to drive at night.

Even if the appellant was found at fault, he should not be condemned because the trip constituted a common venture of which the plaintiff was part. The trip was a pleasure trip, a hunting trip which had been conceived, prepared, organized and executed jointly by the plaintiff and all the other occupants of the car, all the travelling expenses, including the cost of the gasoline, being shared. In the circumstances, the following jurisprudence should apply: *McKenzie* v. *Meyers* (*supra*), *St. Pierre* v. *Trois*

(1) Q.R. (1936) 57 K.B. 357.
(2) [1928] S.C.R. 416.
(3) [1928] S.C.R. 414.
(4) [1945] S.C.R. 62.
(5) Q.R. (1933) 54 K.B. 335.
(6) [1938] 1 D.L.R. 781.

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Rivieres (1), *Trumbower* v. *Lehigh Valley Ry.* (2) and *Jensen* v. *Chicago, Minn. & St. Paul* (3). The plaintiff accepted the risk involved in travelling at night after a day of work and after having eaten and drunk, if it should be found that these facts had any relation to the accident.

As a corollory of the theory of common venture, the appellant may be said to have been the mandatary of his companions when driving the car. In this connection, Art. 1710 C.C. could apply.

On the question of the cross-appeal re the amount awarded, it is submitted that since in Quebec the hospital and medical costs of all persons suffering from tuberculosis are paid by the Province, there was a good reason for the Court not to award any amount on that item.

L. A. Pouliot, K.C., and *G. Mercier* for the respondent. The rule *res ipsa loquitur* is applicable to this case (*Scott* v. *London & St. Katherine Docks* (4), *Winnipeg Electric Co.* v. *Geel* (5) and *Gauthier* v. *The King* (6)). The case of *Demers* v. *Demers* (7) is also relied upon.

The theory of common venture cannot be sustained. That theory is foreign to our law. A party who travels in a car, driven by his friend or companion, does not in any way assume the risks of a trip brought about by the fault of the driver. On the contrary, he is entitled to ask that the driver will drive him safely to his destination, and will not commit a fault; the more so if he pays his share of the expenses of the trip. The theory of common venture has been rejected by our Court of Appeal in *Parent & Colonial* v. *Garneau* (8). The case of *Langevin* v. *Beauchamp* (9) is also relied upon. It is useless to say that the case might be different when a party undertakes a trip with a driver manifestly under the influence of liquors and unfit to drive a car, when that is not the case here. The cases of *Letang* v. *Ottawa Electric Co.* (10) and *Osmond* v. *McColl Frontenac Oil Co.* (11) are also cited.

(1) Q.R. 61 K.B. 439.
(2) 325 Pa. State 397.
(3) 233 Pac. 635.
(4) (1865) 3 H. & C. 596.
(5) [1932] 4 D.L.R. 51.
(6) [1945] S.C.R. 143.
(7) Q.R. (1931) 37 R. de J. 161.
(8) Q.R. (1933) 54 K.B. 335.
(9) Q.R. (1928) 44 K.B. 569.
(10) [1926] A.C. 725.
(11) [1939] 3 D.L.R. 260.

The reduction of the damages claimed on account of previous tuberculosis is wrong on the law and on the facts of the case. In law, whether a party suffers from a latent tuberculosis, he is nevertheless entitled to claim the full damages caused by the birth or eclosion or even aggravation of such sickness. *Morin* v. *C.N.R.* (1)).

THE CHIEF JUSTICE:—Je suis d'accord avec mon collègue, M. le Juge Taschereau. Comme lui, je rejetterais l'appel principal, avec dépens, et je maintiendrais le contre-appel, également avec dépens, en ajoutant au montant déjà accordé au demandeur-intimé par le jugement a quo la somme de $2,000, formant en tout une somme de $6,772, avec intérêts depuis le 15 juin 1950.

The judgment of the Chief Justice and of Taschereau, Locke and Fauteux JJ. was delivered by

TASCHEREAU, J.:—Le défendeur-appelant et quatre autres compagnons, ont quitté Québec vers neuf heures P.M. le 29 octobre 1948, pour se rendre dans le comté de Rimouski, où l'on projetait une excursion de chasse. Le départ s'effectua dans l'automobile du défendeur qu'il conduisait lui-même, et près de St-Pascal, dans le comté de Kamouraska, la voiture quitta la route, et après avoir capoté plusieurs fois sur elle-même, elle alla s'arrêter dans un champ voisin. Comme résultat de cet accident, quatre des voyageurs furent sérieusement blessés, et un autre perdit la vie.

La Cour Supérieure présidée par M. le Juge Gibsone, siégeant à Québec, a rejeté l'action, mais la Cour d'Appel (2), l'a unanimement accueillie, et a accordé au demandeur la somme de $4,772, avec intérêt et dépens. C'est la prétention de l'appelant qu'il n'y a eu aucune preuve de négligence de sa part, et que le demandeur a accepté tous les risques de ce voyage, qui constituait ce qu'il appelle une "aventure commune."

Voyons en premier lieu s'il y a eu négligence du défendeur dans la conduite de sa voiture. Avant de s'embarquer à bord du Traversier pour se rendre à Lévis, les voyageurs se sont arrêtés à la Commission des Liqueurs, où ils ont acheté deux bouteilles de gin, quarante-huit canistres de bière, et quelques autres douzaines de bouteilles de cette

(1) Q.R. 65 S.C. 269. (2) Q.R.[1951] K.B. 299.

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dernière boisson. La preuve ne révèle pas cependant qu'au cours du voyage entre Lévis et St-Pascal, le défendeur ait fait un abus exagéré de liqueurs alcooliques. Il aurait consommé au plus trois canistres de bière, avant de s'arrêter à St-Pacôme avec ses compagnons, vers une heure moins dix du matin, pour prendre un peu de nourriture à un restaurant de l'endroit. C'est après avoir pris ce repas que les cinq compagnons ont repris leur route vers Rimouski, où ils devaient arriver le matin vers cinq heures.

Peu après avoir quitté St-Pacôme, seul le chauffeur ne dormait pas dans la voiture. Les quatre autres, soit à cause de l'heure tardive, soit à cause de la bière consommée, ou du repas qu'ils venaient de prendre, dormaient profondément. Mais ils témoignent qu'avant de s'endormir ainsi, le défendeur conduisait sa voiture d'une façon prudente, à une vitesse moyenne de quarante ou cinquante milles à l'heure. Ils n'ont pas eu connaissance de l'accident, et ne peuvent expliquer comment il est arrivé. Le défendeur lui-même l'ignore; il jure qu'il s'est réveillé à l'hôpital. C'est l'une des victimes, moins blessée que les autres, qui a réussi, quelque temps après l'accident, à se rendre près de la route, et à attirer l'attention des passants qui ont vu à ce que les voyageurs soient hospitalisés à la Rivière-du-Loup. Roland Lajoie, le premier à arriver sur les lieux, témoigne que la voiture était dans le champ, à environ cinquante pieds de la route, et que la clôture était démolie sur une assez grande étendue, à un endroit où le chemin fait une courbe.

C'est la prétention de l'appelant que l'accident demeure inexpliqué, et que sa négligence, nécessaire à sa responsabilité civile, n'a pas été établie. Il soumet diverses hypothèses comme l'éclatement d'un pneu, une défectuosité subite de la voiture, un obstacle sur la route, toutes des causes possibles de l'accident, mais qui lui sont étrangères, et dont il ne pourrait être responsable. Mais tous ces facteurs inconnus ne sont que des conjectures, qui n'ont pas la force probante nécessaire pour permettre aux tribunaux de tirer une conclusion. C'est par la prépondérance de la preuve que les causes doivent être déterminées, et c'est à la lumière de ce que révèlent les faits les plus probables, que les responsabilités doivent être établies.

Il n'y a pas, dans le cas qui nous occupe, de présomption légale qui pèse sur le défendeur. Pour qu'il soit tenu responsable des conséquences de l'accident dont il a été lui-même une malheureuse victime, sa faute doit être prouvée. Il n'est pas essentiel qu'elle le soit par une preuve directe; elle peut l'être par les conclusions que les circonstances justifient de tirer, et par les inférences qui découlent des faits établis.

Quand, dans le cours normal des choses, un événement ne doit pas se produire, mais arrive tout de même, et cause un dommage à autrui, et quand il est évident qu'il ne serait pas arrivé s'il n'y avait pas eu de négligence, alors, c'est à l'auteur de ce fait à démontrer qu'il y a une cause étrangère, dont il ne peut être tenu responsable et qui est la source de ce dommage. Si celui qui avait le contrôle de la chose réussit à établir à la satisfaction de la Cour, l'existence du fait extrinsèque, il aura droit au bénéfice de l'exonération. C'est ce principe qui a été sanctionné par la Cour d'Appel d'Angleterre, et qui me semble conforme à la logique la plus élémentaire. Dans *Scott* v. *London & St. Catherine Docks Co.* (1), décision acceptée par la Cour Suprême, *Ottawa Electric* v. *Crépin* (2), il est dit ce qui suit:

> There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

C'est aussi l'opinion exprimée par M. le Juge Bouffard de la Cour Supérieure de Québec, dans une cause de *Demers* v. *Demers* (3), où il dit:

> Considérant que le défendeur avait alors le contrôle de son automobile et qu'il en était le conducteur et que, pour dégager sa responsabilité, il devait prouver une force étrangère à lui-même ou à son automobile qui l'a jeté dans le fossé et que si non, il y a présomption que c'est par la faute du défendeur, comme conducteur, ou par la vétusté de ses pneus, ou autre cause semblable, si l'automobile a pris cette direction; car, la machine d'elle-même ne pouvait prendre la direction du fossé;

Les faits dans le litige qui nous est soumis, cadrent bien dans cette règle de droit. La preuve révèle que la voiture était en bon ordre, un modèle Ford de 1941, et rien ne peut

(1) (1865) 3 H. & C. 596. (2) [1931] S.C.R. 407.
(3) Q.R. (1931) 37 R. de J. 161.

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laisser soupçonner qu'un pneu ait éclaté, que le mécanisme ait fait défaut, ou qu'une obstruction sur la route ait fait dévier la voiture. Sur ces points, la preuve me paraît dans le sens opposé. Aucun élément extérieur n'est établi, qui puisse justifier la Cour de penser que cet accident est dû à une cause en dehors du contrôle du défendeur. Bien au contraire, quand on lui demande comment est arrivé l'accident, le défendeur, après avoir éliminé toutes les causes possibles, est bien obligé d'admettre qu'il s'est endormi au volant. Voici ce qu'il dit:

> J'en déduis personnellement que j'ai dû m'endormir, je ne peux rien affirmer.

Il pouvait difficilement expliquer d'une autre manière la fin tragique de ce voyage. Malgré qu'il dise qu'il "ne peut rien affirmer", ceci ne détruit pas la force de son premier aveu, que d'ailleurs il répète plus loin dans son témoignage:

> J'en déduis, c'est ça que je déduis, le Coroner à l'enquête a déduit ça.

Il n'est pas étonnant qu'il en fût ainsi: le défendeur avait été à son travail toute la journée; sur la route il avait consommé trois canistres de bière, il avait mangé des "hot dogs" et des "hamburgers" à St-Pacôme, ses quatre compagnons dormaient profondément dans la voiture, il était une heure et demie de la nuit; et sans s'être rendu coupable d'exagération depuis Québec jusqu'à St-Pacôme, il pouvait au procès, facilement conclure qu'il s'était endormi. C'est l'explication la plus logique et la plus probable. Il semble inutile d'ajouter que c'est une négligence qui fait naître la responsabilité, que de s'endormir au volant de sa voiture. Les piétons, les conducteurs des autres véhicules sur les chemins publics, de même que les passagers payants ou gratuits, ont droit de s'attendre à ce que le conducteur d'une voiture soit éveillé quand il est au volant.

Mais l'appelant ajoute qu'il s'agissait au cours de ce voyage, d'une "aventure commune", et que s'il comportait des risques, le demandeur les a assumés, et qu'il ne peut aujourd'hui réclamer les dommages qu'il a soufferts. Il n'est pas contesté que les cinq compagnons, qui partaient en excursion de chasse, partageaient les dépenses de ce voyage. Leur but commun était de se rendre à Biencourt dans le comté de Rimouski, dans la voiture conduite par le

défendeur. Ce n'était pas la première fois que les mêmes compagnons faisaient un semblable voyage. Déjà, dans l'automobile d'un autre, aux mêmes conditions, les cinq amis étaient allés à la chasse ou à la pêche. S'ils doivent être considérés comme des passagers gratuits, dont le défendeur serait le conducteur bénévole, ils peuvent tenir ce dernier responsable, *même de sa faute la plus légère.* Dans certaines provinces, la loi dénie l'action en dommages au passager gratuit, et dans d'autres, elle exige la faute lourde du conducteur bénévole, pour que sa responsabilité soit engagée; mais dans la province de Québec, à cause de l'absence d'un statut spécial, ces cas sont régis par la règle contenue en l'article 1053 C.C. La *levissima culpa* engendre la responsabilité. (*McLean* v. *Pettigrew* (1); *Langevin* v. *Beauchamp* (2); *Parent* v. *British Colonial* (3)). Dans cette dernière cause, la Cour d'Appel disait:

> Le chauffeur bénévole est responsable des dommages soufferts par la personne qu'il transporte, dans un accident d'automobile causé *par sa faute même légère.*

Mais si d'autre part, il y a véritablement un "joint adventure", une aventure commune, l'intimé est-il privé de son recours? Je ne le crois pas. Evidemment, il s'est présenté, et il se présentera encore des cas extrêmes où le passager ne pourra réclamer, et d'autres où il sera tenu solidairement responsable avec le conducteur, du dommage causé à autrui, mais la règle générale, et les faits de la cause actuelle ne justifient pas une pareille conclusion.

En consentant à se rendre à Rimouski dans la voiture de l'appelant, l'intimé n'a pas renoncé à son droit de réclamer les dommages dont il pourrait être la victime, à cause de la négligence du conducteur. Malgré qu'il ait accepté de payer sa part des dépenses, il avait le droit de penser qu'il ne s'engageait pas dans une aventure, où, sans recours de sa part, sa propre sécurité serait en péril. (*Gauthier* v. *le Roi* (4)). Sans doute, s'il eut été passager gratuit, sa réclamation serait indiscutable. N'a-t-il pas droit, s'il paye, à une protection encore plus grande?

C'est sur l'article 1710 C.C. que l'appelant base sa prétention que l'intimé lui a confié un mandat de conduire la voiture, et que les circonstances, à cause de "l'aventure

(1) [1945] S.C.R. 62.
(2) Q.R. (1928) 44 K.B. 569.
(3) Q.R. (1933) 54 K.B. 335.
(4) [1945] S.C.R. 143.

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commune", justifient une mitigation de la rigueur de la responsabilité. Cet article se lit ainsi:

> Le mandataire, dans l'exécution du mandat, doit agir *avec l'habileté convenable et tous les bons soins d'un bon père de famille.*
>
> Néanmoins, si le mandat est gratuit, le tribunal peut mitiger la rigueur de la responsabilité résultant de la négligence ou de la faute du mandataire, suivant les circonstances.

Je ne puis admettre ce raisonnement. Même s'il s'agissait d'un mandat, (ce qui est douteux, car je ne suis pas certain que nous sommes vis-à-vis un contrat, où la gestion d'une affaire a été confiée à une personne, qui s'est obligée à l'exécuter), il me semble que les devoirs de prudence qu'indique 1710 C.C. excluent la maladresse et l'inhabileté dont l'appelant s'est rendu coupable. Le tempérament n'opère que dans le cas de mandat gratuit, et ici, il est rémunéré. Même, s'il s'agissait d'un mandat gratuit, il n'y a pas de circonstances révélées par la preuve, qui justifient une mitigation. Pour ces raisons, je suis d'avis que l'appel ne peut réussir.

Mais le demandeur n'est pas satisfait du montant que lui a accordé la Cour du Banc du Roi (1), et par moyen de contre-appel, il demande qu'il soit augmenté. Il a été sérieusement blessé, ayant souffert comme résultat de l'accident, de traumatismes crânien, cervical et du pied. Les médecins évaluent son incapacité partielle et permanente à 8 à 10%, attribuable aux traumatismes seulement, sans tenir compte de l'état pulmonaire, dont je parlerai plus loin. La Cour lui a accordé les montants suivants:

463.00	pour frais de médecin et d'hospitalisation à l'Hôpital de la Rivière-du-Loup;
1,120.00	perte de salaire;
44.00	perte d'habits;
130.00	souffrances;
3,000.00	incapacité partielle permanente;
15.00	(sur $17.50), Pharmacie de Giffard;
$4,772.00	

Après être demeuré à l'hôpital, à la Rivière-du-Loup, durant environ un mois, le demandeur revint chez lui à Giffard, où il séjourna pendant trois mois, pour ensuite aller à l'hôpital Laval à Québec, où il était encore au moment du procès. Il souffre de tuberculose, et il relie à son accident

(1) Q.R. [1951] K.B. 299.

la cause ou l'aggravation de cette maladie. La Cour d'Appel a décidé qu'il était "problématique" d'établir une relation de cause à effet, et a refusé cette partie de la réclamation.

Antérieurement à l'accident dont il a été la victime, le demandeur faisait partie de l'Armée canadienne, et fut licencié, nous dit-on, parce qu'il était atteint de tuberculose. Il ne semble pas cependant qu'il en ait senti les effets, car son travail de journalier et de menuisier ne fut jamais interrompu, et ce ne fut qu'après l'accident qu'il a commencé à s'en ressentir. Le Docteur Barrette l'a soigné à Giffard, quelques semaines avant son entrée à l'Hôpital Laval, mais il ignorait son état antérieur de santé. Le Docteur Alphonse L'Espérance, surintendant de l'Hôpital Laval, paraît entretenir des doutes sur la date de l'origine de la maladie, mais affirme qu'un traumatisme *est une cause du réveil de la tuberculose latente,* comme d'ailleurs un refroidissement, tel que celui auquel a été exposé l'appelant, après l'accident. Depuis son entrée à l'hôpital, nous dit encore le Docteur L'Espérance, le demandeur a fait de grands progrès. Malgré qu'il soit encore en période d'évolution, et qu'il reste un foyer d'activité, le poumon droit est guéri, et presque la totalité du poumon gauche. Il y a lieu d'espérer à la guérison totale, mais à cause des aléas, il est impossible de déterminer l'incapacité future.

Le Docteur Emile Fortier a constaté que le demandeur souffrait de tuberculose pulmonaire ancienne. Comme le Docteur L'Espérance, il a constaté que depuis son séjour à l'hôpital, la condition de l'appelant s'est améliorée, et ajoute que le traumatisme peut sans doute *être une cause d'augmentation de réaction congestive des foyers de tuberculose.*

L'ensemble de cette preuve me convainc que le demandeur souffrait de tuberculose depuis assez longtemps, mais que l'accident a provoqué un réveil des foyers déjà atteints. Le violent traumatisme dont l'appelant a été la victime, de même que cette longue exposition au froid, durant cette nuit de fin d'octobre, sont sans doute les causes du regain de l'activité tuberculeuse. Ce serait admettre une étrange coincidence que de ne pas voir une relation entre l'accident et l'état subséquent de la victime. Si l'on tient compte qu'avant le choc qu'il a subi, l'appelant durant plusieurs années, n'avait jamais perdu une heure de travail, qu'il ne ressentait pas les effets de sa maladie latente, et si l'on

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considère que les médecins indiquent comme causes du réveil des foyers tuberculeux, le traumatisme et l'exposition au froid, il faut nécessairement attribuer l'accélération de la maladie à ces dernières influences. Une prédisposition à une maladie n'est pas une fin de non recevoir. Toute aggravation causée par un accident donne ouverture à une action en indemnité, dont est responsable l'auteur du quasi-délit.

Le demandeur a droit à un montant additionnel. Au moment où s'est instruit le procès, il était à l'Hôpital Laval depuis au delà d'un an, et malgré une amélioration que les médecins ont constatée, il était encore totalement invalide. Je crois qu'une somme supplémentaire de $2,000.00 pour couvrir les pertes et les inconvénients dont il souffre et pour lesquels il réclame, est une compensation adéquate.

Je suis en conséquence d'opinion que l'appel doit être rejeté avec dépens, que le contre-appel doit être maintenu également avec dépens, et que jugement doit être enregistré contre le défendeur pour la somme de $6,772.00, avec intérêts depuis le 15 juin 1950.

RAND J.:—In this appeal, two questions are raised: whether the Court of King's Bench (1), reversing the Superior Court, was justified in finding the car to have been driven negligently by the appellant; and whether the liability following that finding must be taken to be negatived by the special circumstances of the case.

Those circumstances are these. A party of five, consisting of the appellant, respondent and three others, arranged to go on a shooting trip by automobile, all of the expenses of which, including the cost of gasoline and oil for the automobile, were to be borne equally. The car was owned and driven by the appellant. The party set out from Quebec late in the evening of October 29, 1948, planning to travel all night and to reach Biencourt, County of Rimouski, in the morning. Shortly after midnight they stopped at St.-Pacôme and ate a light lunch. About half an hour from that point, with the other members of the party asleep, the car left the road and after turning over several times stopped in a field about 50 feet from the highway. One member was killed and the respondent suffered severe injuries. The road was in ordinary, good

(1) Q.R. [1951] K.B. 299.

condition, the appellant was driving between 40 and 50 miles per hour, and he says that he must suddenly have dropped into sleep. He had drunk two or three small cans of beer but it has been found that he was sober. There was no evidence of any other fact or circumstance that would point to any other cause. Notwithstanding that, Gibsone J. at trial held the cause had not been shown and dismissed the action. On appeal, the Court, taking the view suggested by the appellant, held his act to constitute a fault from which he was not absolved by the fact of the joint purpose of the party.

The burden on the appellant is to satisfy this Court that that judgment is clearly wrong, and this, in my opinion, he has not done. From the undisputed facts, the fair inference of the cause cannot be any other than what the Court has drawn, and that, in the circumstances, it could be found to have been a fault is, I think, entirely warranted. Operating such a dangerous agency, an automobile moving at high speed, a speed which, judging from the position and condition of the car, was probably greater than that mentioned, with the lives of four sleeping men in his keeping, the driver was under the highest degree of duty toward them. There is nothing to qualify the simple fact of falling asleep at the steering wheel; and ordinarily, drowsiness sends out its premonitory signals, a warning which in such circumstances is disregarded by a driver at his peril. At any rate, I am quite unable to say that the Court in appeal could not properly reach that conclusion here.

Then there is the second question. In this we start with the fact of fault and its effect must be disposed of. The so-called joint venture has not, apparently, in this country been directly considered apart from statutory provisions dealing with guests and passengers in automobiles. Such a group action has two aspects: first, the liability of all for the negligence of one towards an outside person, of which there are many cases in the books; and then the relations and liabilities of the members *inter se*. It is necessary, therefore, to examine the basis of the contention that no liability between the individuals can arise from an act within the scope of their purpose.

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The controlling consideration is, I think, the acceptance of the risk of the culpable act. There being nothing express of that matter here, it must be evidenced as the presumed understanding between the parties on the footing of which they set about their objective. How, then, is a court to gather what, in any case, that was? What is to be found is the understanding the great majority of people more or less familiar with such relations would, in similar situations, consciously or unconsciously assume or would have assented to if the matter had been broached to them. Relations of that sort range from a gratuitous ride to a person at his own request to common carriage: from accommodation between friends, from acts of hospitality, to a purely economic, business or individual purpose relation. The owner in some of these may be taken, impliedly, as intimating to the guest or passenger that he must take things as they are, including the driving. In the absence of special circumstances, that would not ordinarily contemplate anything grossly, much less wilfully reckless in the driver's conduct; but it might include the oversight or inadvertence of daily experience. There is a limited analogy in giving permission to cross one's property: the person permitted may be understood to take the land as he finds it, or except for known and hidden dangers. These implications arise from habitual reactions to situations generally, as inarticulate judgments expressing themselves in vague intimations and acceptances, which are bound up in acquiescence.

When a number of persons bargain to pay the expenses of the journey as here, they normally feel themselves, I should say, not to be gratuitous beneficiaries of the owner; rather they feel themselves to be in the automobile in some degree of right, certainly as under a much lower degree of obligation to him than if gratuitously. Sensing the commitment of their safety to the driver, they undoubtedly rely upon his appreciation of responsibility. That was certainly the case here. Such a conclusion is a deduction from the total circumstances, which may, of course, in any case, be qualified in any manner or degree or by any special feature. If, for example, when the party sets out, it is seen that the driver is under the influence of liquor, or even of sleepiness, and the members are still content that he should drive, the

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assumption of such a risk could very well be inferred; but there is nothing of that sort here. I am unable to conclude, therefore, that the respondent can be taken to have contemplated the particular carelessness of the appellant in driving as one of the hazards which were to be assumed by all as involved in their friendly outing.

The respondent has cross-appealed on the amount of damages awarded. On that I concur with my brother Taschereau.

I would therefore dismiss the appeal and allow the cross-appeal with costs.

Appeal dismissed and cross-appeal allowed, both with costs.

Solicitors for the appellant: *Gagnon & de Billy.*

Solicitor for the respondent: *G. Mercier.*

ANATOLE LUSSIER (PLAINTIFF).....APPELLANT;

1951

*Nov. 5, 6

AND

DAME LAURE ANNA TREMBLAY (DEFENDANT).....RESPONDENT;

1952

*Mar. 3

AND

ARISTIDE LAROSE.....MIS-EN-CAUSE;

AND

FERNANDE TREMBLAY.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Will—Donation—Substitution—Whether institute with power to elect substitutes can make his election subject to charges and conditions—Arts. 641, 651, 735, 875, 881, 925, 928, 935, 944, 962, 1079, 1085, 1088 C.C.

Through a gift *inter vivos* and irrevocable, two brothers received and accepted certain properties from their father and mother. The deed of gift contained, *inter alia*, the following stipulations: that after the death of each of the donees, his share of the gift should fall to his heirs; and that should either of the donees die without any surviving children, or should his children die before having reached the age of majority, or having married, his share of the gift should revert to the

PRESENT: — Rinfret C.J. and Kerwin, Taschereau, Cartwright and Fauteux JJ.

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co-donee or his children. The donors stipulated further that they were not creating a "vraie substitution", and each donee was given the right to dispose of his share equally or otherwise or even in favour of one only of his children or, if he had no children, between the children of his co-donee.

By his will, one of the donees instituted his two sons his universal residuary legatees and divided between them by particular legacies his share of the gift. The will contained, *inter alia,* the stipulation that should either of the sons die without male issue, the properties bequeathed to him should revert to the other son him paying a certain sum of money to the daughters of the deceased son, if any.

One of these two sons of the donee having died, leaving two daughters but no male issue, the other son, the appellant, brought action to recover the properties pursuant to the terms of the donee's will. The action was maintained by the trial judge, but dismissed by a majority in the Court of Appeal for Quebec.

Held: (The Chief Justice dissenting), that the appeal and the action should be dismissed since the testator exceeded the powers vested in him by the deed of donation.

Per Kerwin, Taschereau, Cartwright and Fauteux JJ.: The deed of donation created a fiduciary substitution with power to elect one or more substitutes and with even the right to exclude all but one. The institute, by his will, exercised that power of election, but the charge imposed by him to the substitute to return the property if he died wihout male issue, was null and without effect, since the power to elect does not by its own virtue give the right to impose charges and since the donation does not show any intention to derogate from that principle.

The argument that the substitute, having accepted the universal legacy, accepted at the same time the conditions attached thereto, is not tenable, because the substitute did not receive the property from the testator, but directly from the donors; and, in any event, there is no evidence as to whether he accepted or refused the succession or if there was in fact a residue.

Per Kerwin, Taschereau and Cartwright JJ.: It is not necessary to decide whether an institute with power of appointment can make his appointment subject to a resolutory condition, since the deed creating the substitution did not permit the institute to impose any conditions at all.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing Marchand and Surveyer (*ad hoc*) JJ.A. dissenting, the decision of the trial judge and dismissing the action.

L. E. Beaulieu, K.C., for the appellant. The deed of gift created a fiduciary substitution whereupon the donee was named institute, with the special power of electing one or more substitutes amongst a given class of persons, and that election made by virtue of such special authority could be

(1) Q.R. [1950] K.B. 487.

conditional as well as pure and simple (Arts. 925, 929, 932 C.C.). Although the right to elect is not specifically provided for in the Code, this right has always been admitted by the authors.

The institute vested with the right of election can validly attach to his election a resolutory condition. The donee could have excluded completely and absolutely his son Conrad from the very beginning. Why then could he not exclude him only in case a given event should happen. The authority to do more implies the authority to do less.

The principle that the right to elect does not include the right to impose a charge upon the person so elected is not disputed. But this principle has no application here, and to draw from that principle the conclusion that no resolutory condition can be attached to the election implies a total misconception of the true nature and character of a resolutory condition as well as of the legal effects of the accomplishment of such a condition (Arts. 1085 and 1088 C.C.).

As appears from the authors, there is no similarity between a resolutory condition and a charge, which is nothing else but an obligation. In fact, no authority has been quoted to support the contention that the right to elect a substitute does not include the right to make a conditional election.

Applying the rules governing the resolutory condition and its effects, it is clear that a person elected as a substitute under a resolutory condition must be deemed to have never been elected if the condition is accomplished; that consequently, if Conrad was elected under a resolutory condition which was accomplished, he never was called upon to return the property, since he never received it, and that there was no addition of a supplementary degree to the substitution since Conrad never occupied a degree in it. If, as contended, he was elected under a resolutory condition which was realized, he was in the same position as if he had been originally excluded.

The election made by the institute under resolutory condition was in strict conformity with the text of the deed of donation as well as with the intentions of the donors. The leaving of male issue was "an event future and uncertain", upon which the dissolution of the election was

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made to depend, within the meaning of Art. 1079 C.C. Conrad having died without leaving male children, his election was dissolved with retroactive effect (1085 C.C.), with the result that he must be deemed to have never been elected and the appellant, his brother, to have been originally the sole appointee.

Subsidiarily and at all events, Conrad having accepted the universal legacy made to him by his father, accepted at the same time, the conditions attached thereto, including the proviso that the substituted property would revert to his brother, should he die without male issue (Arts. 641, 645, 651 C.C.). The heir who has accepted a succession is bound to discharge all the debts and liabilities of his "auteur". The reason is that the heir then continues the juridical personality of the *de cujus*: the two form only one juridical person. This obligation was also binding upon Conrad's heirs. These principles are more particularly applicable in the matter of substitution. Under Art. 935 C.C., an institute can impose upon a substitute entitled to get the property in full ownership, the obligation to return it to another person, if such is the condition of a new gift of another property. This is but another application of the principle that a person can bequeath and can substitute a thing belonging to a third party. In fact, Art. 881 C.C. provides that the legacy of a thing which does not belong to the testator "is however valid, and is equivalent to the charge of procuring it or of paying its value, if such appears to have been the intention of the testator. In such case, if the thing bequeathed belongs to the heir or the legatee charged with the payment of it, whether the fact was known to the testator or not, the particular legatee is seized of the ownership of his legacy".

Assuming therefore, that under the deed of donation Conrad was entitled to get the substituted property in full ownership without any obligation to return it to anybody, he became however compelled to return it to his surviving brother when he accepted the universal legacy to which such a condition was attached.

Gustave Monette, K.C., for the respondent. An analysis of the deed of donation clearly reveals that it created a fiduciary substitution. All the authors agree that the right of election given an institute does not allow him to impose

to the substitutes elected by him a charge not provided for in the deed creating the substitution. The institute in the present case had no other power than to exercise a pure election. As soon as he made his election, the substitutes could dispose absolutely of the property which they were deemed to have received directly from the donors and not from the institute. Any charge imposed to the substitutes was therefore null and without effect. A reading of the will shows that what was imposed was a charge and not a resolutory condition.

The substitution on a substitution is in reality the legacy of a thing belonging to a third party. It is forbidden under our *Code,* and the case here does not fall within the exceptions contained in Arts. 881 and 935 C.C. The institute cannot impose a new degree to a substitution since the object does not belong to him and comes directly to the substitute from the original grantor. The argument that Conrad accepted the conditions of the will by accepting the universal legacy, is not tenable because it does not appear whether Conrad accepted the succession.

The CHIEF JUSTICE (*dissenting*):—Le 13 juillet 1905, Joseph Lussier et son épouse, Dame Adéline Bonneau, firent donation entre vifs et irrévocable à l'un de leurs fils, Joseph Lussier, de certains biens mobiliers et immobiliers comprenant, entre autres, deux terres, avec maison et bâtisses ci-dessus construites, formant partie respectivement des lots n^{os} 198 et 199 des Plan et Livre de Renvoi officiels de la paroisse de St-Philippe, dans le comté de Laprairie.

Cette donation comportait, entre autres clauses, les conditions suivantes:

a) Les biens ainsi donnés devront rester propres au donataire. Ils n'entreront dans aucune communauté de biens avec son épouse et le donataire ne pourra en aucune façon avantager son épouse avec ces biens, soit par testament ou autrement; ces biens doivent rester au profit exclusif des héritiers du donataire, aussitôt après le décès de ce dernier, nonobstant toute loi ou coutume contraire.

b) Le donataire aura le droit de faire entre ses enfants, et, à défaut d'enfants, à ceux de son frère co-donataire (d'autres immeubles dans la même donation)

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le partage de ces immeubles, comme bon lui semblera, soit également, soit autrement et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin.

c) Enfin, au cas de décès du donataire sans disposition de ses biens, ceux provenant des donateurs devront être partagés également entre ses enfants, ou, à défaut d'enfants, à ceux de son frère co-donataire.

Par son testament, en date du 20 octobre 1922, le donataire Joseph Lussier, fils, a institué ses deux fils, Anatole et Conrad, ses légataires universels, en propriété, mais il leur a, en outre, légué à titre particulier les deux immeubles acquis en vertu de la donation sus-décrite, savoir: à Conrad Lussier, la terre faisant partie du lot n° 199, et à Anatole Lussier (appelant), la terre portant le n° 198.

Cependant, les legs ainsi faits respectivement à l'appelant et à Conrad Lussier contenaient les conditions suivantes:

a) Que les terrains ci-dessus légués à mes dits fils leur restent propres et n'entrent dans aucune communauté de biens d'entre eux et toutes épouses avec qui ils pourront contracter mariage à l'avenir, et qu'ils ne puissent non plus avantager leurs épouses à même les dits terrains de quelque manière que ce soit;

b) que "si les dits Anatole ou Conrad Lussier décèdent sans enfants mâles ou que ces enfants décèdent eux-mêmes, avant leur majorité sans descendants, les dits terrains à eux sus-légués ou ceux acquis en remploi, à celui qui décèdera ainsi, de même que ces dits enfants comme susdit, retourneront à son frère co-légataire ou si ce dit frère est décédé à ses enfants mâles en remettant quatre mille piastres aux filles du défunt, s'il y en a."

Joseph Lussier, fils, est décédé le 28 août 1924 sans avoir révoqué le testament dont il vient d'être question.

Conrad Lussier est décédé le 2 mai 1944 sans laisser d'enfants mâles, mais en laissant deux filles alors mineures, savoir: Jovette et Fernande.

En interprétant littéralement les clauses du testament que nous venons de reproduire, étant donné que Conrad Lussier n'a laissé aucun enfant mâle, les biens mobiliers qui lui avaient été légués par son père, Joseph Lussier, fils, devaient retourner à son frère Anatole (appelant) qui en devenait ainsi le propriétaire absolu et incommutable, à l'exclusion de tout autre, à la charge de payer aux filles de Conrad une somme de $4,000.

Après le décès de Conrad, la défenderesse-intimée, agissant tant en son nom personnel qu'en sa qualité de tutrice à ses filles mineures, Fernande et Jovette, s'est emparée illégalement, d'après l'appelant, de la terre décrite comme étant partie du lot n° 199, en prétendant qu'elle en avait l'usufruit et que ses deux filles mineures en avaient la nue-propriété à l'encontre de l'appelant.

L'appelant Anatole Lussier, après avoir sommé l'intimée d'avoir à quitter l'immeuble, ainsi que la maison et les dépendances, ce que l'intimée a refusé de faire, a poursuivi cette dernière et ses filles pour réclamer l'immeuble en question, en se déclarant prêt à payer aux filles de Conrad la somme de $4,000, dès que ses droits à la propriété de la terre ainsi revendiquée auront été reconnus judiciairement ou autrement.

L'intimée, par sa plaidoirie écrite, s'est réclamée de l'acte de donation du 13 juillet 1905 par Joseph Lussier, père, et son épouse, entre autres à leur fils Joseph Lussier, et a émis la prétention que cette donation créait une substitution à l'égard des biens qui étaient donnés à ce dernier, par suite de quoi ses enfants étaient les appelés définitifs et sans obligation de rendre les biens à qui que ce soit. Particulièrement, les enfants de Joseph Lussier, fils, (Conrad et Anatole) devaient recevoir indivisément, définitivement et directement des donateurs les biens donnés à leur père. La donation enlevait au grevé Joseph Lussier, fils, tout contrôle sur les biens à l'égard des appelés, sauf qu'elle accordait au dit grevé la faculté d'élire entre ses enfants et de leur partager également ou autrement, comme il y est dit, les immeubles donnés.

Par suite de cette faculté d'élire Joseph Lussier, fils, pouvait partager les biens entre ses divers enfants, et, par l'effet de ce partage, les enfants appelés devenaient propriétaires absolus et définitifs de ceux des biens qui leur seraient ainsi octroyés en partage, mais, alors, ils se trouvaient à recevoir ces biens directement des donateurs sans que Joseph Lussier, fils, put attacher aucune condition ni restriction.

Le testament de Joseph Lussier, fils, ayant fait le partage des biens substitués entre ses deux fils, Conrad et Anatole, ce partage a constitué l'élection dont la faculté lui avait été octroyée par la donation, et, par le fait même, Conrad

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Lussier, le mari et le père des intimées, devint le propriétaire absolu de la terre qui lui fut attribuée mais qu'il tient directement de la donation de ses grands-parents.

Toutes dispositions du testament de Joseph Lussier, fils, qui pourraient avoir l'effet d'affecter, de diminuer ou de restreindre le droit absolu et définitif de Conrad sont nulles et de nul effet comme outrepassant les pouvoirs du testateur qui ne possédait ces biens qu'à titre de grevé et suivant les termes de la substitution.

Or, Conrad Lussier, ainsi devenu propriétaire absolu et définitif de la terre en question, a le 7 décembre 1943, par testament olographe, laissé tous ses biens en usufruit à l'intimée, son épouse, et en propriété à ses deux filles, et, par l'effet de ce testament de Conrad, les filles intimées sont maintenant propriétaires absolues de la terre plus haut mentionnée et leur mère personnellement en est devenue usufruitière.

La défense a donc conclu que le demandeur-appelant n'avait aucun droit de propriété ou de jouissance ou de possession ou autre à l'égard de l'immeuble qui fait l'objet des conclusions de sa déclaration et son action est mal fondée en fait et en droit.

A cette défense l'appelant a répondu que le testament de Conrad était inefficace et sans effet pour conférer quelque droit que ce soit aux intimées.

Dans ces circonstances, l'appelant a réussi devant la Cour Supérieure, mais la majorité de la Cour du Banc du Roi (en Appel), (St-Jacques, Barclay et Casey, JJ.) (1) a infirmé ce jugement et a rejeté avec dépens l'action de l'appelant, Marchand et Surveyer *ad hoc,* JJ., se déclarant dissidents.

Les termes du testament de Joseph Lussier, fils, en faveur de ses enfants, Conrad et Anatole, sont très clairs et ne laissent ouverture à aucune interprétation différente: il a partagé les biens dont il disposait en faveur de ses fils, Conrad et Anatole, qu'il a institués ses légataires universels. En même temps, il léguait à son fils Conrad la terre n° 199 en particulier.

Il est admis de toutes parts que le legs ainsi fait tenait lieu de l'élection que la donation de Joseph Lussier, père, et son épouse l'avaient autorisé de faire.

(1) Q.R. [1950] K.B. 487.

Les intimées prétendent—et la majorité de la Cour du Banc du Roi (en Appel) leur a donné raison sur ce point —que là devait s'arrêter le pouvoir d'élection de Joseph Lussier, fils, et que l'exercice de ce pouvoir constituait Conrad propriétaire absolu de la terre n° 199 avec le droit d'en disposer comme il l'entendrait.

Toute condition, soumettent les intimées, attachée à l'élection ainsi faite, n'était nullement autorisée par la donation originaire. En imposant telles conditions à Conrad, Joseph Lussier, fils, outrepassait les pouvoirs qui lui avaient été conférés par la donation de ses père et mère, et, par suite, ces conditions doivent être considérées comme illégales et tenues pour non écrites.

En conséquence, plaident les intimées, les conditions en question étaient inefficaces pour restreindre le droit de propriété absolue qui était dès lors dévolu à Conrad, non pas par suite de l'acte de son père, Joseph Lussier, fils, mais directement à raison de la donation de ses grands-parents, Joseph Lussier, père, et son épouse.

Comme on le voit, il ne s'agit donc pas de l'interprétation du texte du testament par lequel Joseph Lussier, fils, a légué la terre n° 199 à Conrad. Je le répète, ce texte est clair et n'est susceptible d'aucune ambiguïté. S'il a pu être validement stipulé par Joseph Lussier, fils, il doit recevoir tout son effet.

La question qui est soumise aux tribunaux n'en est pas une d'interprétation, mais exclusivement celle de l'illégalité des stipulations accessoires par lesquelles Joseph Lussier, fils, a entendu affecter l'élection que, par son testament, il faisait de Conrad, en lui attribuant la propriété de la terre dont il s'agit.

Ce n'est donc pas dans le testament de Joseph Lussier, fils, qu'il faut chercher la solution du litige mais plutôt dans l'analyse de la donation originaire. En effet, ainsi que l'a décidé le Comité judiciaire du Conseil Privé dans *Auger* v. *Beaudry* (1):

> It is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and litteral meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean.

(1) [1920] A.C. 1010 at 1014.

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Et ce qui est dit là de l'interprétation d'un testament doit également être dit d'une donation, au moins lorsque le donateur est décédé.

Or, si on analyse la donation faite à Joseph Lussier, fils, par son père et sa mère, il faut y remarquer les éléments suivants:

Le donataire reçoit pour "jouir, user, faire et disposer des dits biens en pleine et absolue propriété en vertu des présentes". Ce n'est pas là le langage du *Code,* à l'article 944, en vertu duquel, en matière de substitution:

> Le grevé possède pour lui-même à titre de propriétaire, à la charge de rendre et sans préjudice aux droits de l'appelé.

Il y a une différence évidente, même si elle est minime, entre jouir, user, faire et disposer des biens en pleine et absolue propriété et posséder à titre de propriétaire, à la charge de rendre. En effet, si le donataire peut, entre autres choses, disposer en pleine et absolue propriété, c'est le contraire de posséder à titre de propriétaire, "à la charge de rendre".

Ensuite, la donation stipule comme "condition expresse et sous peine de nullité" que les biens donnés devront rester propres au donataire et n'entrer dans aucune communauté de biens entre lui et son épouse, les biens donnés devant rester "au profit exclusif des héritiers du donataire, aussitôt après le décès de ce dernier, nonobstant toute loi ou coutume contraire".

Les donateurs déclarent expressément qu'ils "n'entendent pas par là créer une vraie substitution".

J'entends bien qu'une substitution peut être créée sans que le mot lui-même soit employé et que, en général, c'est d'après l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée, plutôt que d'après l'adaptation ordinaire de certaines expressions, qu'il doit être décidé s'il y a ou non substitution (C.C. 928). Mais, après tout, les donateurs, qui étaient propriétaires des biens donnés, avaient bien le droit d'en disposer comme ils l'entendaient et c'est tout de même une sommaire façon de donner à cette clause, où ils déclarent formellement qu'ils n'entendent pas créer une vraie substitution, l'interprétation judiciaire qu'ils en ont créé une.

En vertu de cette donation, le donataire a le droit de faire entre ses enfants (et, à défaut d'enfants, à ceux de son frère co-donataire) le partage des immeubles "comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin".

C'est clairement une autorisation absolue "comme bon lui semblera ... suivant qu'il avisera".

Les donateurs donnent aux donataires, "nonobstant toutes conditions contraires", le droit de faire entre eux toute vente ou échange des terrains qui leur sont respectivement donnés, aux charges et conditions qui leur conviendront, et sans l'intervention des donateurs qui leur laissent tout pouvoir à cette fin.

Ce pouvoir est attribué aux donataires nonobstant toutes conditions contraires et aux charges et conditions qui leur conviendront. N'est-il pas possible d'interpréter cette clause comme voulant dire que, si telle vente ou échange a lieu, elle pourra se faire sans tenir compte des conditions contraires qui sont mentionnées dans la donation et seulement en ayant égard "aux charges et conditions qui leur conviendront"? Qu'adviendrait-il, alors, de la prétendue substitution?

Enfin, la dernière clause de la donation contient les mots suivants: "L'intention des donateurs étant que ce dernier terrain" (celui qui est attribué à Modeste Lussier) retournera "aux garçons du dit Joseph Lussier, fils," au cas où Modeste Lussier ne laisserait pas de garçons issus de mariage légitime ou que ses garçons décéderaient en minorité et sans enfants mâles, "l'intention des donateurs étant que ce dernier terrain appartienne à un propriétaire du nom de Lussier tant qu'il sera possible dans leur famille".

On remarquera que cette intention n'est pas que le terrain reste dans la famille, mais il est spécifiquement déclaré qu'il doit appartenir "à un propriétaire du nom de Lussier".

En présence de toutes les déclarations que nous venons d'énumérer et qui sont contenues dans la donation originaire, on ne saurait se défendre de l'impression que dans son testament Joseph Lussier, fils, s'en est inspiré.

Il a évidemment traité la donation comme n'ayant pas créé une "vraie substitution" de la terre n° 199; il a considéré qu'il ne la possédait pas seulement pour lui-même

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"à titre de propriétaire, à la charge de rendre" (qui est le texte même de l'article 944 C.C.), mais comme pouvant en "disposer . . . en pleine et absolue propriété", suivant l'expression employée par les donateurs dans la donation originaire.

Il a tenu compte de la "condition expresse et sous peine de nullité" que la terre en question lui reste propre, n'entrant dans aucune communauté de biens entre lui et son épouse, et demeure "au profit exclusif des héritiers du donataire, aussitôt après le décès de ce dernier, nonobstant toute loi ou coutume contraire", ainsi que les donateurs l'avaient stipulé.

Il a interprété le droit que lui donnait la donation de faire entre ses enfants le partage des immeubles, "comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin", comme lui donnant le droit, relativement à la terre n° 199, d'en disposer par testament, ainsi qu'il l'a fait.

Il s'est dit que si, "nonobstant toute condition contraire", il pouvait, en conformité avec la donation, faire avec son frère Modeste toute vente ou échange des terrains qui leur étaient respectivement donnés (y compris la terre n° 199), aux charges et conditions qui leur conviendraient—ce qui inévitablement implique le pouvoir de faire disparaître l'obligation d'élection en faveur de Conrad ou d'Anatole—il s'ensuivait que rien ne s'opposait donc à ce qu'il put faire le moins, à savoir: exercer son droit d'élection en faveur de Conrad, en y attachant la condition ou restriction qu'il a insérée dans son testament.

Et, enfin, Joseph Lussier, fils, a tenu compte de l'intention des donateurs (exprimés au moins quant à l'un des terrains donnés), que la propriété appartienne aux descendants portant le nom de Lussier—ce qui ne pouvait s'appliquer qu'aux enfants mâles, puisqu'en contractant mariage les filles prennent le nom de leur mari et leurs enfants ne s'appelleraient pas Lussier.

Joseph Lussier, fils, pouvait donc trouver dans la donation elle-même, à mon humble point de vue, toute justification pour faire son testament comme il l'a fait et léguer à Conrad la terre n° 199 avec la condition qu'il a ajoutée.

Cette condition, à l'effet que, si Conrad décédait sans enfants mâles, la terre n° 199 retournerait à son frère Anatole (ou inversement) n'est pas une charge; elle n'impose à Conrad aucune obligation. S'il a des enfants mâles à son décès, elle l'autorise à disposer de la terre n° 199 absolument comme il l'entendrait. Si aucun enfant mâle ne lui survit, par l'opération même de la stipulation du testament, la terre va à son frère Anatole, ou, si ce dernier est alors décédé, à ses enfants mâles. Conrad lui-même n'a rien à y voir; toute la dévolution résulte des clauses mêmes du testament. Elle ne nécessite aucun acte de la part de Conrad; ce n'est donc pas une charge, c'est tout simplement une restriction à son droit de disposer absolument.

On ne peut donc écarter cette clause du testament de Joseph Lussier, fils, en se basant sur la théorie que celui qui a le pouvoir d'élection doit l'exercer purement et simplement et qu'il ne peut y superposer une charge quelconque.

D'autre part, je ne vois pas pourquoi l'on ne saurait appliquer au cas qui nous occupe le principe que "qui peut le plus peut le moins". Or, indiscutablement, d'après la façon dont le pouvoir d'élection avait été donné à Joseph Lussier, fils ("comme bon lui semblera, soit également soit autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin"), il aurait pu ne rien léguer à Conrad du bien qui lui avait été donné par ses père et mère. Il pouvait exercer son pouvoir d'élection en faveur d'un seul, comme bon lui semblait et suivant qu'il aviserait. Par conséquent, il pouvait élire Anatole seul, "toute autorisation lui étant donnée à cette fin".

En fait, il a légué plus que cela à Conrad. Au lieu de l'éliminer complètement, il lui a légué pour lui-même la terre n° 199, avec la seule restriction qu'il ne pourrait en disposer que si, à son décès, il laissait des enfants mâles. C'était sans doute moins que s'il lui avait légué la terre sans restriction; mais c'était plus que ce qu'il avait le droit de faire, à savoir: ne pas la lui léguer du tout. En tout respect, je cherche encore la réponse que l'on peut faire à ce raisonnement.

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Mais là ne s'arrête pas l'objection que l'on peut trouver au jugement de la majorité de la Cour d'Appel en l'espèce, et je suis d'accord avec les deux juges dissidents (Marchand et Surveyer, JJ.AA.).

Joseph Lussier, fils, par son testament, a institué Conrad et Anatole ses légataires universels. Comme le dossier ne démontre pas le contraire, ils doivent être tenus pour avoir accepté, car "la renonciation à une succession ne se présume pas; elle se fait par acte devant notaire ou par une déclaration judiciaire de laquelle il est doné acte" (C.C. 651). Et, bien naturellement, une présomption n'a pas besoin de preuve (C.C. 1239). Pour qu'elle soit repoussée (et pourvu qu'il ne s'agisse pas d'une présomption *juris et de jure*), il faut une preuve contraire.

En seule qualité de légataires universels, Conrad et Anatole sont les continuateurs de leur père, Joseph Lussier, fils, et ils sont tenus d'en acquitter toutes les charges et dettes (C.C. 735 et 875).

Il s'ensuit que, même si l'on devait considérer le legs de la terre n° 199 à Conrad comme étant affecté d'une charge, celui-ci en serait quand même tenu, en vertu du legs universel que lui a fait son père, dont il a accepté la succession.

De toute façon, par conséquent, la stipulation par laquelle la terre n° 199 est dévolue à Conrad, qu'elle soit envisagée comme résultat de l'élection faite par son père par suite de la donation originaire, ou qu'elle soit considérée comme l'obligeant à raison de sa qualité de légataire universel de son père, doit recevoir son application.

Il faut donc décider que le testament par lequel il a voulu céder la terre en question à sa femme, en usufruit, à ses filles, en propriété, allait à l'encontre du titre même d'où il tire son droit de propriété de son vivant. Ce titre était affecté par une condition résolutoire, c'est-à-dire, la condition qu'il eut des enfants mâles. Il n'en a pas eu, et, par l'effet de cette condition résolutoire, la terre n° 199 retournait à son frère Anatole.

En plus, comme l'a fait remarquer l'honorable Juge Surveyer, en léguant l'usufruit de la terre à son épouse, Conrad agissait directement et expressément en violation de la défense qui se trouve contenue à la fois dans la dona-

tion originaire et dans le testament de Joseph Lussier, fils. Les biens originairement donnés par les auteurs de Joseph Lussier, fils, puis légués par ce dernier, ne pouvaient en aucune façon être transmis à l'épouse de Conrad "de quelque manière que ce soit".

L'intimée, Dame Laure Anna Tremblay, ne pouvait donc émettre aucune prétention à l'usufruit de la terre en question. Du point de vue pratique, cependant, il se peut que je doive me borner à cette remarque, car, si ses filles, Fernande et Jovette, avaient été justifiées dans l'action qu'elles ont intentée, je suppose que, en ce qui concerne l'appelant, cette question serait demeurée indifférente.

D'accord avec les deux juges dissidents et avec le juge de première instance, je suis d'avis que la demande de l'appelant est bien fondée; que le jugement qui l'a accueillie en Cour Supérieure doit être confirmé et que, maintenant l'appel du jugement de la Cour du Banc du Roi, celui de la Cour de première instance doit être rétabli, avec dépens dans toutes les Cours.

KERWIN J.:—For the reasons given by my brothers Taschereau and Fauteux, this appeal should be dismissed with costs.

The judgment of Kerwin, Taschereau and Cartwright JJ. was delivered by

TASCHEREAU, J.:—Le 13 juillet 1905, Joseph Lussier, Sr, cultivateur de la paroisse de St-Philippe de Laprairie, et son épouse commune en biens, Dame Adéline Bonneau, ont fait donation entre vifs et irrévocables à leurs deux fils, Joseph Lussier, Jr, et Modeste Lussier, de certains biens détaillés comme suit:

A Joseph:

a) Une somme de $1,000 payable dans trois ans;

b) Un roulant de ferme;

c) Une ferme mesurant environ 109 arpents, étant le lot n° 198 du cadastre de la paroisse de St-Philippe;

d) Une autre ferme mesurant environ 96 arpents, étant partie du lot n° 199 du même cadastre.

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A Modeste:

a) Une ferme mesurant 150 arpents et formés des lots nos 51 et 52, et partie du lot 199 du cadastre de la même paroisse de St-Philippe;

b) Un morceau de terre mesurant 106 arpents et étant partie du lot n° 50 du même cadastre;

c) Un roulant de ferme.

L'acte de donation contenait entre autres, les clauses suivantes:

Les présentes sont consenties sous la condition expresse et sous peine de nullité, que les biens présentement donnés devront rester propres à chacun des Donataires et n'entrer dans aucune communauté de biens d'entre eux et leurs épouses, et encore que les Donataires ne pourront en aucune manière avantager leurs épouses à même les dits biens, soit par testament ou autrement, en plus de ce qui a pu leur être assuré par leur contrat de mariage respectif, *les biens provenant des Donateurs devant rester au profit exclusif des héritiers des Donataires, aussitôt après le décès de ces derniers, nonobstant toute loi ou coutume contraire.*

Encore à la condition que si l'un ou l'autre des Donataires décédait sans enfants ou que ces enfants décéderaient eux-mêmes avant leur majorité ou leur mariage, les immeubles présentement donnés à celui qui décéderait ainsi, de même que ces enfants comme susdit retourneront à son co-donataire ou à ses enfants à l'exclusion de tous autres.

Les Donateurs n'entendent pas par là créer une vraie substitution, et chacun des Donataires aura le droit de faire entre ses enfants et à défaut d'enfants à ceux de son frère co-donataire, le partage des dits immeubles comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin.

Joseph Lussier, Jr, qui eut deux fils, Anatole et Conrad, a fait son testament devant G. A. Leblanc, notaire, le 20 novembre 1922, et est subséquemment décédé le 28 août 1924, sans l'avoir révoqué. Aux termes de ce testament, il a institué ses deux fils, Anatole et Conrad, ses légataires universels, en propriété; mais il leur a en outre légué, à *titre particulier,* les deux immeubles lui provenant de son père, savoir: à Conrad, il a légué la terre, étant partie du lot n° 199 des plan et livres de renvoi officiels de la paroisse de St-Philippe, et à Anatole, le demandeur dans la présente cause, il a légué la terre connue et désignée comme étant le n° 198 du même cadastre.

Les deux fermes ci-dessus mentionnées furent cependant léguées à Conrad et à Anatole Lussier aux conditions suivantes:

13° Je veux et entends que les terrains ci-dessus légués à mes dits fils leur restent propres et n'entrent dans aucune communauté de biens d'entre

eux et toutes épouses avec qui ils pourront contracter mariage à l'avenir, et qu'ils ne puissent non plus avantager leurs épouses à même les dits terrains de quelque manière que ce soit;

14° Je veux et entends que si l'un ou l'autre de mes dits fils, Conrad ou Anatole vient à décéder "ab intestat" et laissant des enfants, les enfants mâles recueillent le terrain ci-dessus légué à leur père, mais ils devront remettre une somme de quatre mille piastres courant aux filles, leurs sœurs, s'il y en a; *et si les dits Anatole ou Conrad Lussier décèdent sans enfants mâles* ou que ces enfants décèdent eux-mêmes avant leur majorité sans descendants, *les dits terrains à eux sus-légués* ou ceux acquis en remploi, à celui qui décédera ainsi, de même que ces dits enfants comme susdit, retourneront à son frère colégataire ou si ce dit frère est décédé à ses enfants mâles *en remettant quatre mille piastres aux filles du défunt,* s'il y en a. Cependant mes dits fils pourront et devront faire entre leurs enfants mâles ou à défaut d'enfants mâles au survivant des dits Conrad ou Anatole Lussier, le partage des dits terrains comme bon leur semblera, mais en ce cas si le dit défunt des dits Conrad ou Anatole Lussier laisse des filles issues de son mariage, les enfants mâles qui hériteront des dits terrains devront une somme de quatre mille piastres courant aux filles du défunt Anatole ou Conrad Lussier.

Le but que j'ai en vue dans la disposition de mes dits terrains a été de conserver ces dits terrains à une personne portant le nom de Lussier autant que possible.

Le 2 mai 1944, Conrad Lussier est décédé, laissant deux filles mineures, Jovette et Fernande. Par son testament olographe fait le 7 décembre 1943, il laissa, après avoir fait quelques legs particuliers, le résidu de tous ses biens à ses deux filles, et l'usufruit à son épouse, Dame Laure Anna Tremblay.

Anatole Lussier, l'appelant dans la présente cause, a alors pris action pour se faire déclarer propriétaire de cette partie du lot n° 199 de la paroisse de St-Philippe de Laprairie, objet de la donation par Joseph Lussier, Sr, à Joseph Lussier, Jr, et légué par ce dernier à son fils Conrad. Pour se conformer aux termes du paragraphe 14 du testament, il a offert, avec son action, la somme de $4,000 aux deux filles, et l'action est dirigée contre la défenderesse, Dame Laure Anna Tremblay, tant personnellement que comme tutrice à ses deux filles mineures. Au cours de l'instance, Fernande est devenue majeure, et a repris l'instance en son nom personnel. La Cour Supérieure a maintenu l'action, mais la Cour d'Appel (1) l'a rejetée, MM. les Juges Marchand et Surveyer étant dissidents.

(1) Q.R. [1950] K.B. 487.

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C'est la prétention du demandeur-appelant que l'acte de donation du 13 juillet 1905 a créé une substitution, en vertu de laquelle le donataire Joseph Lussier était grevé de substitution avec pouvoir spécial de choisir et de nommer un ou plusieurs appelés parmi une certaine classe de personnes, et que ce choix pourrait être conditionnel aussi bien que pur et simple. Il soutient que la nomination par Joseph Lussier, en vertu de son testament du 20 novembre 1922, de ses deux fils, Conrad et Anatole, l'appelant, comme grevés de substitution, des deux fermes qu'il avait reçues en vertu de l'acte de donation de son père et de sa mère, (*avec la réserve que si un des fils décédait sans enfants du sexe masculin, la ferme ainsi à lui léguée retournerait au frère*) est un choix fait en vertu d'une condition résolutoire, et était en stricte conformité avec l'acte de donation du 13 juillet 1905. Enfin et subsidiairement, l'appelant prétend que Conrad Lussier, ayant accepté le legs universel fait à lui par son père, a accepté en même temps les conditions attachées au testament, y compris celle que la ferme substituée retournerait à son frère Anatole, si lui, Conrad, *décédait sans enfants du sexe masculin.*

Je crois qu'il ne fait pas de doute que, malgré les termes employés dans l'acte de donation, *"Les donateurs n'entendent pas par là créer une vraie substitution"*, il s'agit bien tout de même d'une substitution. Les parties l'admettent, et si l'on s'est servi de ces termes, c'est probablement parce que les appelés à la substitution n'étaient pas individuellement désignés. Il est certain aussi que le donateur ou le testateur qui veut créer une substitution, n'a pas l'obligation de désigner d'une façon précise les appelés, et qu'il soit loisible au grevé qui est investi de ce pouvoir, de faire ce choix. Cette autorisation n'est pas spécifiquement donnée dans le *Code Civil,* mais il n'est dit nulle part que le donateur ou le testateur ne peut pas déléguer ce pouvoir au grevé. Les auteurs le reconnaissent, mais ajoutent que quand ce droit est exercé par le grevé, ce dernier ne peut pas imposer de charges à l'appelé. La raison est évidente, et c'est que le grevé ne dispose pas en faveur de la personne qu'il choisit, car cette dernière est toujours censée recevoir de l'auteur de la substitution, de qui provient la libéralité. Ce choix peut se faire par quelque écrit que ce soit, et il peut même se manifester dans un

testament, par le legs particulier que le grevé peut faire à une personne d'un groupe désigné par le donateur ou le testateur originaire, des biens possédés par le grevé à titre de propriétaire, et faisant l'objet de la substitution. Ce choix pourra même être contenu "dans un legs universel fait par le grevé; mais ce legs universel ne vaudra comme legs que par rapport aux biens libres que le grevé pouvait avoir d'ailleurs que de la substitution; par rapport à ceux compris dans la substitution, il ne vaudrait que comme un acte renfermant le choix dont la faculté lui avait été accordée par rapport aux dits biens". Vide: (Pothier, Vol. 8, (Bugnet) N^os^ 81-82-83, page 482) (Thévenot D'Essaule, Traité des Substitutions, N° 1007) (Mignault, Vol. 5, page 144).

Dans la présente cause, quand Joseph Lussier, Sr., a donné par acte de donation certaines terres à son fils Joseph, Jr., et qu'il a dit que *"les biens provenant des donateurs devront rester au profit exclusif des héritiers des donataires, aussitôt après le décès de ces derniers"*, et que "si l'un ou l'autre des donataires décédait sans enfants ou que ces enfants décèderaient eux-mêmes avant leur majorité ou leur mariage, les immeubles présentement donnés à celui qui décèderait ainsi, de même que ses enfants comme susdit, *retourneront à son co-donataire* ou à ses enfants à l'exclusion de tous autres", et qu'enfin il ajoute que *"Les donateurs n'entendent pas par là créer une vraie substitution, et chacun des donataires aura le droit de faire entre ses enfants et à défaut d'enfants à ceux de son frère co-donataire, le partage des dits immeubles comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera"*, il créait une substitution dont son fils Joseph Lussier, Jr, était le grevé, et il lui laissait évidemment la faculté de choisir qui devait définitivement recueillir les biens substitués à titre d'appelés.

Joseph Lussier, Jr., a plus tard exercé cette faculté d'élection; par son testament du 20 novembre 1922, il a légué les deux immeubles dont il avait joui à titre de propriétaire, en sa qualité de grevé, attribuant à Conrad la terre faisant partie du lot n° 199, et à Anatole la terre connue et désignée comme étant le lot n° 198 du cadastre de la paroisse de St-Philippe. En faisant ces deux legs, comme

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l'enseigne la doctrine, *il exerçait bien le pouvoir de faire le choix des appelés,* que ses auteurs lui avaient conféré par l'acte de donation de 1905.

Cependant, en léguant ses deux terres, à titre particulier, à ses deux fils et en faisant ainsi le choix des appelés, le testateur Joseph Lussier, Jr., s'exprime à peu près dans les termes suivants: "Si les dits Conrad ou Anatole Lussier décèdent *sans enfants mâles.....les dits terrains à eux susdégués.....retourneront à son frère* co-légataire, ou si son frère est décédé, à ses enfants mâles, en remettant $4,000 aux filles du défunt, s'il y en a". Et il ajoute ensuite par la clause 15 de son testament: "Le but que j'ai en vue dans les dispositions de mes dits terrains a été de conserver ces dits terrains à une personne portant le nom de Lussier si possible".

L'intimée prétend qu'en léguant à ses deux fils les biens substitués, Joseph Lussier, Jr., a exercé son droit d'élection qui ne comportait pas d'autres pouvoirs que celui d'exercer un pur choix. Il avait charge de restituer à des appelés, et dès cette restitution, les appelés, Conrad et Anatole, pouvaient disposer absolument et définitivement des biens qu'ils étaient censés recevoir directement du substituant, et non du grevé. La charge imposée par Joseph Lussier, Jr., à son fils Conrad, que s'il décédait *sans enfants du sexe masculin,* la ferme dont il jouissait comme grevé à son décès, retournerait à son frère, est une charge non prévue par l'acte organisant la substitution, et, en conséquence elle serait nulle. Il s'ensuivrait que Conrad serait demeuré définitivement propriétaire, et que l'immeuble ne serait pas dévolu à Anatole Lussier, le demandeur-appelant, à cause de l'absence *d'enfants du sexe masculin* dans la famille de Conrad.

Joseph Lussier, Jr., pouvait-il imposer cette restriction, ou, s'il choisissait de nommer son fils Conrad comme appelé, ne devait-il pas le nommer purement et simplement? Il est certain que la restriction concernant Conrad ne se trouve pas dans l'acte de donation de 1905. A cette date, une substitution fut créée avec droit d'élection, mais on ne trouve nulle part que Joseph Lussier, Sr., et sa femme aient manifesté le désir que dans le cas où leurs arrière petits-enfants, enfants de Anatole et Conrad, ne seraient pas du sexe masculin, les immeubles, objets de la substitution,

devaient retourner à l'autre co-donataire. Au contraire, la clause ne prête à aucune ambiguïté—elle se lit ainsi:

Si l'un ou l'autre *des donataires décédait sans enfants* ou que ces enfants décèderaient eux-mêmes avant leur majorité ou leur mariage, les immeubles présentement donnés à celui qui décèderait ainsi, de même que ses enfants comme susdit, retourneront à son co-donataire ou à ses enfants à l'exclusion de tous autres.

Il semble donc que Conrad devenait le propriétaire définitif de l'immeuble qui lui était légué, du moment qu'il avait une postérité, *mais pas nécessairement du sexe masculin.* On a cru voir dans une autre clause de la donation, l'intention de l'auteur de la substitution, que les immeubles devaient être définitivement la propriété de ses fils, à condition qu'ils eussent un enfant du sexe masculin. Cette clause se lit ainsi:

Les donateurs stipulent spécialement que si le dit Modeste Lussier *ne laissait pas de garçon issu de mariage légitime,* ou que ces garçons décèderaient en minorité *et sans enfant mâle,* le terrain ci-dessus décrit comme partie du N° 50 du cadastre de St-Philippe retournera aux garçons du dit Joseph Lusiser, fils, l'intention des donateurs étant que ce dernier terrain appartienne à un propriétaire du nom de Lussier, tant qu'il sera possible dans leur famille.

Cette clause de la donation originaire, comme on le voit, ne se rapporte qu'au lot n° 50, donné à Modeste, frère de Joseph Lussier, Jr., et ne peut en conséquence laisser supposer que la même restriction doive s'appliquer aux autres immeubles affectés par la substitution—*Inclusio unius, exclusio alterius.*

Ce litige est né du fait que Joseph Lussier, Jr., a conditionné le droit de Conrad comme appelé définitif, à la survivance d'enfants mâles à son décès, et dont l'absence l'empêcherait d'être propriétaire définitif avec droit de léguer le lot n° 199 à ses deux filles, comme il l'a fait. Les appelants prétendent que le grevé Joseph Lussier, Jr., pouvait agir ainsi, car, d'après eux, il n'aurait pas imposé de charge à Conrad, ce qu'il n'avait pas le droit de faire, mais il aurait simplement imposé une condition, qui, si elle ne se réalisait pas, annulait l'élection faite par Joseph Lussier, Jr., avec effet rétroactif à la date de sa mort. Ceci signifierait que Conrad n'aurait jamais été choisi comme appelé. On cite les articles 1079, 1085 et 1088 du *Code Civil,* qui démontrent en effet, que si une condition ne se réalise pas, le contrat est résolu avec effet rétroactif.

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On peut évidemment répondre à cette prétention que s'il est défendu au grevé, chargé de faire une élection, d'imposer une charge ou une obligation à l'appelé, parce qu'il doit choisir ce dernier purement et simplement, il est difficile de justifier l'imposition d'une condition. On dit que Joseph Lussier, Jr., pouvait ne pas choisir Conrad, et que s'il le choisissait, il pouvait en conséquence conditionner son choix. Mais le même raisonnement s'applique à l'imposition d'une charge ou d'une obligation, et pourtant tous les auteurs s'accordent à dire qu'on ne peut l'imposer.

Mais il ne semble pas nécessaire de déterminer si, d'une façon générale, le grevé ayant la faculté d'élection, peut imposer une condition à la propriété définitive de l'appelé, car dans le cas qui nous occupe, je suis d'opinion que l'acte de donation de 1905, qui a créé la substitution, ne permet pas au grevé de subordonner ainsi le droit des appelés à une condition. L'acte de donation, en effet, stipule clairement que ceux qui seront appelés le seront *définitivement, s'ils ont des enfants quel que soit leur sexe.* Comment alors Joseph Lussier, Jr., après avoir déterminé que Conrad serait l'un des appelés, pouvait-il lui dire que le choix serait résolu, s'il mourait sans enfants mâles?

De plus, en faisant ce qu'il a fait, Joseph Lussier, Jr., ajoutait sans aucun doute un degré à la substitution. En effet, l'auteur de la substitution ne voulait établir qu'un seul grevé avec pouvoir de choisir des appelés définitifs ayant des enfants du sexe masculin ou du sexe féminin. En admettant la prétention de l'appelant, il s'ensuit qu'il y aurait eu deux appelés qui auraient successivement joui de l'immeuble, à titre de propriétaires, durant toute leur vie, viz: Joseph Lussier, Jr., et Conrad Lussier, et l'appelant, Anatole Lussier serait l'appelé définitif. Ceci est évidemment contraire aux termes mêmes de l'acte de donation créant la substitution. Ce serait créer substitution sur substitution, c'est-à-dire que par le désir du grevé, un autre grevé après lui, serait successivement ajouté, avant que l'immeuble ne devienne la propriété définitive d'un nouvel appelé. La Loi ne permet pas de changer ainsi la volonté d'un donateur ou d'un testateur. L'article 935 dit bien que l'auteur d'une substitution peut dans une nouvelle donation entre vifs, alors qu'il dispose de d'autres biens à la même personne, substituer les biens qu'il lui a donnés

purement et simplement dans la première; mais, cette substitution n'a d'effet que par l'acceptation de la disposition postérieure dont elle est une condition, et sans préjudice aux droits acquis aux tiers. Ceci signifie que lorsqu'un donateur donne purement et simplement des biens à un de ses fils, il ne peut pas plus tard déclarer que ce fils qui a accepté devienne grevé, et nommer un appelé pour recevoir définitivement. Le seul cas où la loi permet de substituer les biens antérieurement donnés, est le cas où le même donateur fait une nouvelle donation, acceptée par le donataire, et dans laquelle il est stipulé que les premiers biens sont affectés d'une substitution. Cet article cependant n'autorise en aucune façon l'appelé lui-même, de créer un nouveau degré comme on a tenté de le faire dans le présent cas. Il s'ensuit que Joseph Lussier, Jr., grevé de la substitution de son père, ne pouvait pas, en choisissant son fils Conrad comme appelé, imposer la condition qu'il a stipulée.

Mais, M. le Juge Marchand de la Cour d'Appel, qui était dissident, a fait un raisonnement différent, et l'appelant l'a accepté devant nous comme moyen subsidiaire. C'est la prétention de M. le Juge Marchand que Joseph Lussier, Jr., a choisi et élu ses deux fils Conrad et Anatole, non pas comme appelés, mais comme des grevés chargés à leur tour de rendre, en suivant certaines règles. Joseph Lussier, Jr., ne pouvait pas imposer à ses fils cette substitution, mais il pouvait la leur proposer, et si ces derniers acceptaient, elle les liait comme toute autre convention. Joseph Lussier, Jr., ayant par son testament nommé ses deux fils ses légataires universels, non seulement des biens substitués par la donation mais de tous ses autres biens, ceux-ci ont en conséquence été "les continuateurs de la personnalité juridique de leur père, garants et responsables de l'exécution des volontés exprimées dans son testament". En acceptant la succession globale, Conrad se trouvait par conséquent à accepter la condition imposée par son père Joseph Lussier, Jr., et à sa mort, s'il n'avait pas d'enfants mâles, la terre portant le n° 199 devait retourner à Anatole.

Il est important de remarquer que, par son testament du 20 novembre 1922, Joseph Lussier, Jr, a divisé ses biens en deux parts parfaitement distinctes. En premier lieu, il laisse, comme nous l'avons vu, la partie du lot 199 à Conrad, et le lot n° 198 à Anatole, qui sont les lots substitués venant

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de Joseph Lussier, Sr, par acte de donation. Après avoir fait d'autres legs particuliers, il lègue le résidu de tous ses biens tant meubles qu'immeubles, encore à ses deux fils Conrad et Anatole, et enfin, ayant toujours en vue les lots 199 et 198, il fait les déclarations contenues au paragraphe 14 de son testament, dans lequel se trouve la clause à l'effet que, "si les dits Conrad ou Anatole Lussier décèdent sans enfants mâles.....les dits terrains à eux susmentionnés (les lots 199 et 198) retourneront à son frère colégataire, ou si son frère est décédé, à ses enfants mâles, en remettant $4,000 aux filles du défunt". Cette clause, évidemment, ne s'applique pas au résidu de la succession, mais purement et simplement aux lots substitués par la donation de l'aïeul.

Il était nécessaire, en effet, que Joseph Lussier, Jr, divisât ainsi en deux les biens qu'il laissait à ses fils Conrad et Anatole. Quand Joseph, Jr, dit qu'il donne et lègue à Conrad le lot n° 199, et à Anatole le lot n° 198, il n'emploie pas une expression exacte, car en réalité, il n'y a ni don ni legs de ces deux lots. Le seul pouvoir de Joseph, Jr, était de désigner Conrad et Anatole comme appelés à la substitution, et comme devant définitivement être propriétaires de ces deux lots. A l'ouverture de la succession de Joseph, Jr, Conrad et Anatole ont reçu chacun son lot, non pas de Joseph, Jr, mais bien de leur grand-père Joseph, Sr, et par conséquent, ces deux lots ne faisaient nullement partie du patrimoine transmis à ses fils par Joseph, Jr.

Joseph, Jr, aurait pu de son vivant, *par tout écrit quelconque,* faire le choix des appelés, et il n'était pas nécessaire qu'il le fît par testament. En le faisant de cette façon, il ne changeait cependant pas la nature de l'acte qu'il posait, qui demeure un choix pur et simple, indépendant des autres clauses du testament. C'est comme s'il y avait deux documents différents, un choix et un testament. Comme le dit Pothier (Vol. 8, Bugnet, page 482):

> Ce choix pourra même être contenu dans un legs universel fait par le grevé; mais ce legs universel ne vaudra comme legs que par rapport aux biens libres que le grevé pouvait avoir d'ailleurs que de la substitution; par rapport à ceux compris dans la substitution, il ne vaudrait que comme un acte renfermant le choix dont la faculté lui avait été accordée par rapport aux dits biens.

Je n'ai pas de doute que la condition eut été nulle si elle avait été posée dans un document différent. Pourquoi penser qu'elle est légale et qu'elle lie Conrad parce qu'on la trouve dans le testament, quand on sait que le choix fait par le grevé, dans un acte de dernière volonté ou ailleurs, ne vaut que pour les biens de la substitution, et nullement quant à ceux qui proviennent d'autres sources?

Il me semble difficile de croire que Conrad, malgré qu'il fut héritier résiduaire avec Anatole, ait accepté cette condition, qui, si elle ne se réalisait pas, le dépouillait d'un bien qui lui provenait de son aïeul. En prenant possession du lot n° 199, il recevait comme appelé ce que son grand-père lui avait donné, et cet acte isolé, n'ayant aucune relation avec les autres biens, ne peut pas laisser supposer qu'il ait accepté conditionnellement l'ensemble de la succession. D'ailleurs, nous ne savons pas s'il a refusé ou accepté cette succession, et nous ignorons même s'il y avait un résidu.

Mais, nous dit l'appelant, Joseph Lussier, Jr, pouvait, en vertu de dispositions de l'article 881 C.C., par son testament, léguer conditionnellement à Anatole la chose d'autrui, c'est-à-dire l'immeuble 199 dont Conrad était définitivement propriétaire comme appelé. L'article 881 C.C. se lit ainsi:

Le legs que fait un testateur de ce qui ne lui appartient pas, soit qu'il connût ou non le droit d'autrui, *est nul, même lorsque la chose appartient à l'héritier ou au légataire obligé au paiement.*

Le legs est cependant valide et *équivaut à la charge de procurer la chose ou d'en payer la valeur,* s'il paraît que telle a été l'intention du testateur. *Dans ce cas si la chose léguée* appartient à l'héritier ou légataire obligé au paiement, soit que le fait fût ou non connu du testateur, le légataire particulier est saisi de la propriété de son legs.

On voit donc, qu'en vertu du premier paragraphe de cet article, en principe, *le legs de la chose d'autrui est nul.* Que Joseph Lussier, Jr, *ait su ou non* que l'immeuble en question était la propriété de Conrad, le legs en faveur de Anatole est frappé de nullité. C'est l'application de la maxime bien connue *Nemo plus juris ad alium transferre potest quam ipse haberet.* Il n'y a qu'un seul cas où cette règle rigide puisse souffrir une exception, c'est lorsqu'il paraît que l'intention du testateur a été que l'héritier ou le légataire obligé au paiement soit tenu de se procurer la chose ou d'en payer la valeur. Dans ce cas, si la chose léguée appartient à l'héritier ou au légataire obligé au paiement, soit que le fait fût ou non connu du testateur, le légataire

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particulier est alors saisi de la propriété de son legs. Mais, comme le dit Mignault (Vol. 4, page 369): "Toutefois, le seul fait que l'héritier ou le légataire serait propriétaire de la chose léguée, même à la connaissance du testateur, ne fera pas présumer cette intention". Dans le cas qui nous occupe, Conrad Lussier, héritier, est propriétaire de la chose, à la connaissance du testateur, et il n'y a aucune intention manifeste de la part de ce dernier, qui nous permettrait d'appliquer l'exception prévue au second paragraphe de l'article 881 C.C.

Ce que je viens de dire supposerait qu'il s'agit d'un legs fait par Joseph Lussier, Jr, legs que le législateur avait en vue quand il a édicté l'article 881 C.C. Je crois plutôt que ce sont les règles de la substitution qui doivent s'appliquer, et qui autrement seraient sans effet. Comme d'une façon générale la substitution du bien d'autrui est interdite par nos lois, sauf dans le cas de l'article 935 C.C. qui prévoit un cas exceptionnel de *substitution après coup,* par la même personne, entre les mêmes parties, et portant sur une chose précédemment donnée par le même donateur, il s'ensuit que la disposition faite par Joseph Lussier, Jr, est sans effet.

La conclusion à laquelle je suis arrivé me dispense de discuter les motifs invoqués par M. le Juge St-Jacques, qui était aussi d'avis de rejeter la présente action.

Pour toutes ces raisons, je suis d'opinion que le jugement majoritaire de la Cour d'Appel doit être maintenu, avec dépens de toutes les cours.

The judgment of Kerwin, Cartwright and Fauteux JJ. was delivered by

FAUTEUX J.:—Par acte de donation entre vifs, le 13 juillet 1905, Joseph Lussier et son épouse, Adéline Bonneau, ont donné à leurs fils, Joseph et Modeste, acceptant, les biens immobiliers suivants, tous du cadastre de la paroisse de St-Philippe:

A Joseph, deux terres: l'une formant partie du lot 198, l'autre formant partie du lot 199, avec maison et autres bâtisses y construites;

A Modeste, trois terres: l'une située en la Côte St-Claude, l'autre en la Côte St-Joseph et la dernière—faisant l'objet d'une stipulation spéciale à laquelle il sera ci-après référé—, en la concession St-Claude, formant partie du lot 50, avec maison et autres bâtisses y construites.

Cet acte de donation comporte particulièrement que les biens donnés doivent, au décès des donataires, retourner au profit exclusif de leurs enfants. Les donateurs accordent cependant à chacun des donataires "le droit de faire entre ses enfants et à défaut d'enfants à ceux de son frère co-donataire, le partage des dits immeubles comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin."

C'est par un testament en la forme authentique fait le 20 octobre 1922, et en lequel il instituait ses deux fils, Anatole et Conrad, ses légataires universels, que Joseph Lussier fils, décédé le 28 août 1924, exerçait cette faculté d'élire en leur attribuant, dans la forme d'un legs particulier, respectivement la terre 198 et la terre 199. Dans chaque cas, la terre n'est pas donnée purement et simplement, et en pleine propriété, mais avec certaines prohibitions et, particulièrement, à la condition que si l'un des deux fils décédait sans enfants mâles, la terre à lui ainsi léguée retournerait à son frère, à charge, par ce dernier, de remettre aux filles du premier, s'il en laissait, une somme de quatre mille dollars.

Et voilà bien l'éventualité qui, s'étant produite dans le cas de Conrad, a donné lieu au présent litige relativement à la terre 199.

En fait, Conrad décédait le 2 mai 1944 sans laisser d'enfants mâles. Il avait, cependant, par testament olographe fait le 7 décembre 1943 et vérifié le 12 mai 1944, constitué sa femme et ses deux filles, héritières de cette terre, respectivement en usufruit et en nue-propriété.

C'est alors qu'Anatole Lussier, l'appelant, invoquant les dispositions du testament de son père, Joseph Lussier, fils, et le fait que son frère Conrad était décédé sans laisser d'enfants mâles, a, par action pétitoire, réclamé la possession et la propriété de cette terre formant partie du lot 199, après avoir offert de verser aux filles de Conrad la somme de quatre mille dollars.

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En défense, les héritiers de Conrad, soit sa femme, Dame Laure-Anna Tremblay, l'intimée, personnellement et en qualité de tutrice à ses filles mineures, Jovette et Fernande Lussier—cette dernière devenant à sa majorité intimée en reprise d'instance—toujours demeurées en possession de ces biens immobiliers, ont plaidé particulièrement: Que Joseph Lussier fils ne pouvait, par son testament, accorder plus de droits à ses héritiers relativement à cette terre qu'il n'en avait lui-même en vertu de l'acte de donation; que, suivant cet acte, les appelés à la substitution dont il était grevé devenaient saisis de la propriété de l'immeuble par le choix qu'il en avait fait en son testament et ce, depuis l'instant de son décès; que la faculté de partager le bien dont il était donataire n'incluait pas le droit d'imposer les prohibitions, conditions et charges apparaissant en son testament.

Ainsi apparaît la question principale à la détermination de cette cause: La faculté d'élire les appelés donnée en la donation comporte-t-elle le droit d'imposer les prohibitions, conditions et charges apparaissant au testament du grevé?

A cette question, le savant Juge de la Cour Supérieure a répondu affirmativement. En somme, dit-il, l'imposition des prohibitions, conditions et charges ci-dessus constitue une modalité de choix conforme aux termes et à l'esprit de la donation. Et l'action fut maintenue en conséquence.

En appel (1), cette décision fut cassée par un jugement majoritaire, MM. les Juges Barclay, Casey et St-Jacques, de la majorité, et M. le Juge Marchand, de la minorité,—M. le Juge Surveyer étant le seul à ne pas traiter de la question—adoptèrent une vue opposée à celle exprimée en première instance. Les deux premiers en font le *ratio decidendi*. M. le Juge St-Jacques maintient l'appel en s'appuyant sur un point subsidiaire dont la considération ici devient non nécessaire, vu la conclusion à laquelle j'en arrive sur le point principal. MM. les Juges Marchand et Surveyer, de la minorité, renvoient l'appel; le premier décide que si Joseph Lussier fils ne pouvait pas imposer, par testament, une substitution à ceux qu'il avait le droit d'appeler à la substitution créée par son père, il pouvait quand même la leur proposer comme condition du legs résiduaire qu'il établissait en leur faveur, et, l'ayant acceptée, ils sont liés comme par toute autre convention. Le second renvoie

(1) Q.R. [1950] K.B. 487.

l'appel en disant que le testament de Conrad ne peut prévaloir contre les dispositions de celui de son père, Joseph Lussier, Jr.

Il faut, en premier lieu, référer à l'acte de donation et noter que les biens ont été donnés aux donataires aux conditions suivantes, lesquelles sont numérotées pour fins de références:

1. Pour par les dits Donataires, leurs hoirs et ayant cause, jouir, user, faire et disposer des dits biens en pleine et absolue propriété en vertu des présentes et en prendre possession immédiatement, *sous les conditions et aux charges ci-après énumérés*.....

2. *Les présentes sont consenties sous la condition expresse et sous peine de nullité,* que les biens présentement donnés devront rester propres à chacun des Donataires et n'entrer dans aucune communauté de biens d'entre eux et leurs épouses, et encore que les Donataires ne pourront en aucune manière avantager leurs épouses à même les dits biens, soit par testament ou autrement, en plus de ce qui a pu leur être assuré par leur contrat de mariage respectif, *les biens provenant des Donateurs devant rester au profit exclusif des héritiers des Donataires, aussitôt après le décès de ces derniers, nonobstant toute loi ou coutume contraires.*

3. *Encore* à la condition que si l'un ou l'autre des Donataires décédait *sans enfants* ou que *ces enfants* décéderaient eux-mêmes, avant leur majorité ou leur mariage, les immeubles présentement donnés à celui qui décéderait ainsi, de même que *ses enfants* comme susdit, retourneront à son co-donataire ou à *ses enfants* à l'exclusion de tous autres.

4. Les Donateurs n'entendent pas par là créer une vraie substitution, et chacun des Donataires aura le droit de faire entre *ses enfants* et à défaut *d'enfants* à ceux de son frère co-donataire, le partage des dits immeubles comme bon lui semblera, soit également ou autrement, et même à un seul, suivant qu'il avisera, toute autorisation lui étant donnée à cette fin.

5. Et au cas de décès de l'un des dits Donataires, sans disposition de ses biens, ceux provenant des Donateurs seront partagés également entre ses enfants ou à défaut *d'enfants,* à ceux de son frère co-donataire.

Je ne puis douter que ces dispositions contiennent une substitution fidéicommissaire. L'article 928 du *Code Civil* donne, entre autres, la règle d'interprétation suivante:

En général, c'est d'après l'ensemble de l'acte et l'intention qui s'y trouve suffisamment manifestée, plutôt que d'après l'acceptation ordinaire de certaines expressions, qu'il est décidé s'il y a ou non substitution.

En l'espèce, et nonobstant les expressions employées au début de la clause 4: "Les Donateurs n'entendent pas créer une vraie substitution....."—lesquelles s'expliquent par la faculté d'élire qui y est immédiatement exprimée—, les dispositions ci-dessus établissent manifestement que la donation a été consentie "sous la condition expresse et sous peine de nullité" que les biens provenant des donateurs

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doivent "rester au profit exclusif des héritiers des Donataires, aussitôt après le décès de ces derniers, nonobstant toute loi ou coutume contraires". Chacun des donataires est donc ainsi chargé de rendre à son décès ce qu'il reçoit par l'acte de donation. Et c'est là la définition de la substitution fidéicommissaire (art. 925). Ainsi en a conclu la Cour d'Appel et les parties admettent en leurs factums le bien-fondé de cette décision sur ce point fondamental. Ces vues, peut-être est-il utile d'ajouter, ne peuvent être affectées du fait de la présence à l'acte d'une clause, non citée ici, accordant aux donataires une liberté limitée d'aliéner (vente ou échange entre eux). Ni en droit, ni en fait, cette clause n'a ici de portée. L'article 952 prescrit que "le substituant peut indéfiniment permettre l'aliénation des biens substitués; la substitution n'a d'effet, en ce cas, que si l'aliénation n'a pas eu lieu".

Il est également décidé par la Cour d'Appel et admis aux factums des parties que, nonobstant le silence du *Code* sur le sujet, il est loisible à celui qui dispose de ses biens par acte de libéralité d'accorder—ainsi qu'on l'a fait en la clause 4—aux donataires chargés de substitution, la faculté d'élire le ou les appelés parmi ceux qui y sont indiqués. C'est la doctrine exposée aux œuvres de Pothier (Bugnet), Vol. 8, p. 481, n^{os} 80 et suivants, au Traité des Substitutions Fidéicommissaires, de Thévenot d'Essaule, pp. 317 et suivantes, et dans Migneault, Vol. 5, p. 144.

Dans le cas de Joseph Lussier fils, cette faculté, tel que déjà dit, a été exercée par testament. Il convient d'en citer les clauses pertinentes au débat:

5° Je donne et lègue à Conrad Lussier, l'un de mes fils, une terre..... formant partie du lot 199.....

6° Je donne et lègue à Anatole Lussier, un autre de mes fils, une terre..... formant partie du lot 198.....

12° Je donne et lègue le résidu de tous mes biens tant meubles qu'immeubles que je délaisserai lors de mon décès à mes deux dits fils, Conrad et Anatole Lussier, en parts égales, que je fais et institue pour mes légataires généraux et universels en propriété à compter du jour de mon décès sous les réserves ci-après mentionnées;

13° Je veux et entends que les terrains ci-dessus légués à mes dits fils leur restent propres et n'entrent dans aucune communauté de biens d'entre eux et toutes épouses avec qui ils pourront contracter mariage à l'avenir, et qu'ils ne puissent non plus avantager leurs épouses à même les dits terrains de quelque manière que ce soit;

14° Je veux et entends que si l'un ou l'autre de mes dits fils, Conrad ou Anatole vient à décéder *"ab intestat"* et laissant des enfants, les enfants mâles recueillent le terrain ci-dessus légué à leur père, mais ils devront remettre une somme de quatre mille piastres courant aux filles, leurs sœurs, s'il y en a; et si les dits Anatole ou Conrad Lussier décèdent sans enfants mâles ou que ces enfants décèdent eux-mêmes avant leur majorité sans descendants, les dits terrains à eux sus légués ou ceux acquis en remploi, à celui qui décédera ainsi, de même que ces dits enfants comme susdit, retourneront à son frère co-légataire ou si ce dit frère est décédé à ses enfants mâles en remettant quatre mille piastres aux filles du défunt, s'il y en a. Cependant, mes dits fils pourront et devront faire entre leurs enfants mâles ou à défaut d'enfants mâles au survivant des dits Conrad ou Anatole Lussier, le partage des dits terrains comme bon leur semblera, mais en ce cas si le dit défunt des dits Conrad ou Anatole Lussier laisse des filles issues de son mariage, les enfants mâles qui hériteront des dits terrains devront une somme de quatre mille piastres courant aux filles du défunt, Anatole ou Conrad Lussier.

15° Je veux et ordonne que mes dits fils ne puissent hypothéquer mes dits terrains seulement dans le cas où ils se vendront l'un à l'autre, alors celui qui achètera le terrain de son frère pourra hypothéquer son terrain pour une somme de quatre mille piastres courant aux fins de donner des garanties à son frère ou de faire un emprunt d'un étranger pour payer son dit frère. Et quand ils vendront les dits terrains, le prix en provenant devra être employé à l'achat d'autres terrains qui seront soumis aux mêmes réserves que ceux que je leur lègue présentement;

Le but que j'ai en vue dans la disposition de mes dits terarins a été de conserver ces dits terrains à une personne portant le nom de Lussier autant que possible.

Ainsi apparaît-il, des dispositions de son testament, que Joseph Lussier fils a, sans distinction aucune, traité les biens substitués au même titre que ses propres, tout comme si l'acte de donation l'en avait constitué le propriétaire absolu: Il a prétendu les donner et les léguer; il les a affectés à des prohibitions et des restrictions; il les a lui-même grevés d'une nouvelle substitution en chargeant ses fils Conrad et Anatole, petits-enfants des donateurs, de les rendre à d'autres. Pareilles dispositions, aussi bien que l'intention les inspirant,—intention révélée à la fin de la clause 15—, ne laissent aucun doute que Joseph Lussier fils a traité tous ces biens, sans distinction, comme si c'était les siens.

Qu'il ait eu ce droit quant aux biens libres de la substitution, ses propres, la question ne se pose pas.

Mais pouvait-il ce faire quant aux biens substitués qu'il avait reçus par la donation dont il avait accepté les termes, je ne le crois pas.

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Sans la présence de cette clause de faculté d'élire et de partager, il est certain qu'il ne le pouvait pas. L'intention des donateurs manifeste trop clairement que ce sont les enfants des donataires qui sont les appelés définitifs. Aussi bien, dans cette alternative, chaque enfant du donataire, en qualité d'appelé, et dans les termes mêmes de l'article 962, "reçoit les biens directement du substituant et non du grevé. L'appelé est, par l'ouverture de la substitution à son profit, saisi de suite de la propriété des biens, de la même manière que tout autre légataire; il peut en disposer absolument et il les transmet dans sa succession, s'il n'y a prohibition ou substitution ultérieure". L'acte de donation ne comporte pas de prohibition ou de substitution ultérieure applicable en l'espèce, quant à la terre 199. Mais il en comporte, relativement à la terre 50.

La présence de la clause de faculté d'élire et de partager modifie-t-elle, en principe, cette conclusion? Les auteurs s'accordent à répondre dans la négative et la raison qu'ils en donnent est précisément le principe sanctionné dans notre loi par l'article 962. Pothier, Vol. 8 (Bugnet), p. 482:

> La différence entre la substitution et la faculté de choix, et celle par laquelle on substitue simplement la famille, est que, lorsque le grevé, en conséquence de la faculté de choisir qui lui est accordée, a déclaré son choix en faveur de quelqu'un de la famille, la substitution ne sera ouverte par son décès qu'au profit de celui ou ceux qu'il aura choisis, au lieu que, si on eût simplement substitué la famille, sans accorder ce choix, la substitution aurait été ouverte au profit de tous ceux de la famille qui se seraient trouvés les plus proches parents du grevé, lors de l'ouverture.
>
> Le choix que le grevé fait selon la faculté qui lui est accordée, d'une personne de la famille, n'est point une disposition qu'il fasse envers cette personne qu'il choisit; c'est un pur choix; c'est pourquoi la personne qu'il a choisie, qui en vertu de ce choix recueille la substitution, n'est point du tout censée tenir les biens compris en la substitution de celui qui l'a choisie; mais elle est censée les tenir de l'auteur de la substitution.
>
> C'est pourquoi le grevé qui a fait ce choix, ne peut pas, pour raison de ce seul choix, imposer aucune charge à la personne qu'il a choisie; car, en la choisissant, il n'a proprement exercé aucune libéralité envers elle, il ne lui a donné rien du sien. *Non enim facultas necessare electionis, propriae liberalitatis beneficium est: quid est enim quod de se videatur deliquisse qui quod relinquit omnimodo reddere debuit?* L. 67 S. 1er, ff. de Leg. 2.
>
> Ce choix n'étant point une disposition que le grevé fasse de ses biens envers la personne qu'il a choisie, il peut le faire par quelque acte que ce soit, pourvu que ce soit par écrit.

Thévenot d'Essaule, Traité des Substitutions, N° 1013, p. 319:

> Le grevé, en élisant, n'est point censé exercer une libéralité envers celui qu'il choisit. Il ne peut par conséquent le soumettre à aucune charge de substitution, ni autre quelconque.

Ricard, Des Donations, Vol. 2, p. 448:

> C'est pourquoi le grevé qui a fait ce choix, ne peut pas, pour raison de ce seul choix, imposer aucune charge à la personne qu'il a choisie: car, en la choisissant, il n'a proprement exercé aucune libéralité envers elle, il ne lui a donné rien du sien.

Mignault, Vol. 5, p. 145:

> Le choix fait par le grevé ne constitue pas une disposition en faveur de la personne choisie; c'est un pur choix et la personne choisie tiendra les biens du substituant et non pas du grevé. Ce dernier ne peut donc à raison de ce seul choix, imposer aucune charge à la personne qu'il a choisie, car il n'exerce envers elle aucune libéralité.

Peut-on trouver dans l'acte de donation de 1905, et relativement à la terre 199 en particulier, une intention expresse ou implicite des donateurs d'accorder aux donataires, en leur donnant la faculté d'élire et de partager, le droit de ne pas rendre à l'élu la terre purement et simplement, en pleine et absolue propriété, et tout comme si ce dernier la recevait des donateurs eux-mêmes?

Notons bien que si les donateurs ont accordé à chacun des donataires "le droit de faire entre ses enfants et à défaut d'enfants à ceux de son frère co-donataire, le partage des dits immeubles comme bon lui semblera",—discrétion nécessairement qualifiée et restreinte par les mots qui suivent "soit également ou autrement, et même à un seul"—, ils ne leur en ont pas fait une obligation. A la vérité, ils ont, par la clause immédiatement suivante (5), prescrit qu'à défaut de tel partage—les donataires pouvant juger à propos de ne pas le faire—, les biens substitués se partageront également entre les enfants.

Dans tous les cas, le droit accordé vise *le partage des biens* de façon égale ou inégale, au profit de tous, de quelques-uns, ou même d'un seul des enfants des donataires. Il faut bien noter que si chaque donataire avait le droit d'exclure un ou plusieurs de ses enfants, il ne pouvait pas tous les exclure. De sorte que, assumant que l'un des donataires n'eût eu qu'un seul enfant, un garçon ou une fille, peu importe,—les donateurs n'ont pas fait de distinction

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de sexe et ceci est d'ailleurs immatériel au présent raisonnement—il n'y aurait pas eu lieu à partage ou à élection. La clause 4 serait alors sans effet et, par le jeu exclusif de la clause 2 précitée, cet enfant unique aurait été saisi, dès le décès de son père, comme propriétaire absolu de tous les biens donnés, tout comme si la faculté d'élire et de partager eût été absente de l'acte de donation. En pareil cas, il devient manifeste qu'aucune restriction, prohibition ou substitution, n'aurait pu être imposée par le donataire. Il faut tenir ce résultat comme manifestant, en telle occurrence, l'intention véritable des donateurs de donner à cet enfant, ainsi alors élu par eux-mêmes, la propriété absolue de tous les biens substitués.

Je ne puis voir dans l'établissement de cette faculté d'élire et de partager, l'intention des donateurs d'accorder aux donataires le droit de contrôler, par l'établissement de restrictions, prohibitions, ou par la création de nouvelles substitutions, la propriété de l'appelé, que ce soit l'appelé choisi par les donateurs eux-mêmes dans l'éventualité précitée alors que la clause 4 est inopérante, ou que ce soit le ou les appelés, encore choisis par les donateurs eux-mêmes, dans l'éventualité prévue par la clause 5, ou que ce soit l'appelé ou les appelés choisis par les donataires dans le cas où ils peuvent se prévaloir et, de fait, se prévalent de la faculté à eux accordée. Nulle part apparaît à l'acte d'intention de traiter la propriété de l'enfant, ou des enfants appelés à la substitution par le choix des donataires, différemment de celle de l'enfant, ou des enfants qui y sont appelés par le jeu exclusif des clauses de la donation.

Dans tous les cas, par le simple appel au partage, les dispositions de l'acte sont satisfaites et si cet appel est fait par les donataires, en vertu du mandat qu'il leur est loisible d'exercer, ce mandat en est, par le fait même, épuisé.

La stipulation particulière, relative au lot 50, donné à Modeste Lussier, loin d'aider la prétention de l'appelant, illustre bien la règle générale à laquelle les donateurs entendent faire exception. Elle se lit comme suit:

Les donateurs stipulent spécialement que si le dit M. Modeste Lussier ne laissait pas de garçons issus de mariage légitime, ou que ces garçons décéderaient en minorité et sans enfants mâles, *le terrain* ci-dessus décrit comme partie du *lot numéro 50* du cadastre de St-Philippe retournera aux garçons dudit Joseph Lussier fils, l'intention des donateurs étant que *ce dernier terrain* appartienne à un propriétaire du nom de Lussier tant qu'il sera possible dans leur famille.

Avec déférence, je dois ajouter, en conclusion, qu'on ne solutionne pas le problème avec le truisme: "Qui peut le plus, peut le moins", auquel on peut répondre comme l'a suggéré le procureur de l'intimée: "Qui peut le moins, ne peut le plus". La véritable question est précisément de savoir si celui qui a la faculté d'élire "peut le plus". A cette question,—tel que déjà signalé—, la doctrine répond dans la négative et rien dans l'acte ne suggère que les donateurs ont entendu y déroger.

Mais, dit M. le Juge Marchand, s'il est vrai que Joseph Lussier, fils, ne pouvait pas imposer, à ceux qu'il choisissait comme appelés, des restrictions, prohibitions ou charges relatives aux biens substitués, il pouvait les leur proposer et c'est ce qu'il aurait fait en leur léguant le résidu de ses biens à la condition qu'ils acceptent ces prohibitions, restrictions et charges, sur les biens substitués qu'ils recevaient. De sorte qu'en acceptant ce legs résiduaire, conclut-il, ils acceptaient, par le fait même, la proposition et devenaient liés comme dans un contrat.

Vainement ai-je fouillé les plaidoiries écrites pour y déceler cette proposition de droit ou les allégations de faits sur lesquelles elle doit reposer. Il n'apparaît pas davantage que ce point, sur lequel le savant Juge de la Cour d'Appel décide du litige, ait été autrement soumis à la considération de la Cour de première instance. Et il semble, au surplus, que si cette proposition avait été plaidée devant la Cour d'Appel, les Juges de la majorité y auraient référé dans leurs raisons de jugement.

A cela, on peut ajouter que le point soulevé suggère les questions suivantes: Joseph Lussier, fils, a-t-il, en fait, laissé à son décès, dans son patrimoine, des biens résiduaires? Dans l'affirmative, Conrad Lussier a-t-il accepté ce legs résiduaire pour sa part? S'il l'a accepté, a-t-il fait cette acceptation ès qualités d'héritier testamentaire et en considération de cette "proposition" apparaissant dans le testament de son père sous la forme d'une imposition non permise, ou simplement ès qualités d'héritier légal. Le dossier ne l'indique pas. Assumant que le point soulevé par M. le Juge Marchand serait bien fondé en droit, on ne saurait l'utiliser à la disposition de cette cause sans joindre, à la considération d'une proposition qui n'a pas été plaidée, la spéculation sur des faits qui ne sont ni allégués, ni prouvés.

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Aussi bien, je crois qu'il y a lieu d'appliquer ici la règle reconnue par cette Cour dans *The Century Indemnity Company* v. *Rogers* (1); *Sullivan* v. *McGillis and others* (2); et, tout récemment encore, *City of Verdun* v. *Sun Oil Company* (3), voulant, en principe, que les parties sont liées par les positions qu'elles ont prises et soutenues dans la conduite de leur cause.

Je rejetterais l'appel, avec dépens des trois Cours.

Appeal dismissed with costs.

Solicitors for the Appellant: *Beaulieu, Gouin, Bourdon, Beaulieu and Casgrain.*

Solicitors for the Respondents: *Monette, Filion, Meighen and Gourd.*

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*Feb. 20, 21, 26, 27 and 28.

*Oct. 22

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... RESPONDENT

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... APPELLANT

AND

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Taxation—Municipal Corporations—Companies—Covenant by C.P.R. to continue its workshops within limits of City of Winnipeg forever—Covenant by City to forever exempt C.P.R. property then owned or thereafter owned within city's limits for railway purposes from all municipal taxes forever—C.P.R. incorporated by Letters Patent under Great Seal authorized by special act of Parliament—Whether possessed

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1932] S.C.R. 529 at 536. (2) [1949] S.C.R. 201 at 215.
(3) [1952] 1 S.C.R. 222.

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of powers of a Common Law corporation or of statutory company—Whether possessed of power to so covenant—By-laws embodying agreement validated by Act of Provincial Legislature—Whether agreement ultra vires of City—Whether city's limits to be construed as of date of agreement or to apply to subsequent extensions—Whether business tax within exemption—Whether exemption includes C.P.R. hotel and restaurant.—The Canadian Pacific Railway Act, 1881 (Can.) c. 1; 1883 (Man.) c. 64; Canada Joint Stock Companies' Act, 1877 (Can.) c. 43, s. 3.

Under an agreement entered into by the Canadian Pacific Railway Company and the City of Winnipeg ratified by by-law of the latter and validated by statute, the C.P.R. undertook to construct 100 miles of railroad from the city south westerly and to erect a passenger depot within the city on or before February 1, and November 1, 1883, respectively, and to deliver to the city a bond obligating it with all reasonable despatch to build within the limits of the city its principal workshops for the main line of its railway within the Province and the branches thereof radiating from Winnipeg and to forever continue the same within the city, and to erect within the city cattleyards suitable for its main line and the said branches. The city undertook in return to convey the lands upon which the depot was to be built and to issue to the company debentures for the sum of $200,000. The agreement further provided that upon the fulfilment by the C.P.R. of the conditions stipulated in the by-law, all property then owned or that might thereafter be owned by the company "within the limits of the City of Winnipeg for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind."

The obligations assumed by both parties were fulfilled and no question arose until 1948 when the City assessed all the lands and buildings, including a hotel and restaurant, owned by the company, for realty and business taxes.

In this action brought to restrain the assessment, four main questions arose:

(1) Is the said agreement valid and binding?

If valid—

(2) Is the exemption operative only within the limits of the city as these existed at the time the agreement was made or as those limits may have been from time to time constituted?

(3) Is the exemption applicable to the hotel and restaurant?

(4) Does the exemption include business tax?

All questions were decided by the trial judge in favour of the company. On appeal, his decision on question one was affirmed, but reversed on the others.

Held: The appeal of the C.P.R. should be allowed, the appeal of the City of Winnipeg dismissed, and the trial judgment restored. Rand and Kellock JJ. would have varied the judgment so as to exclude the hotel and restaurant from the exemption.

Per: Rinfret C.J., Kerwin, Taschereau, Locke and Fauteux JJ.—It was unnecessary to determine whether the company was a common law corporation; by virtue of 1881 (Can.) c. 1 and s. 4 of the Letters Patent, the company had the power to enter into the agreement.

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Per: Rand and Kellock JJ.—The powers of the company were not those of a common law corporation. Assuming that the company could not bind itself to maintain the works in the city forever, but considering that (1) the company might in fact maintain them indefinitely, (2) the city, having up to the present time received the entire current consideration for which it had bargained, (3) recission having been virtually impossible from the completion of the works, and (4) for any failure in the future, security by way of recoupment from future tax exemptions will be available, the city should be restrained from repealing the by-law, upon the company undertaking, in the event of any future removal of the works, to recoup the city for such damages, not to exceed the amount of the benefits enjoyed under the tax exemption hereafter, as might be found to be suffered by the city by reason of the removal.

Per: Estey and Cartwright JJ.—The power to execute the contract here in question was, in any event, necessarily incidental to the express powers.

APPEAL by the city of Winnipeg, and a further appeal by the Canadian Pacific Railway Company, from a judgment of the Court of Appeal of Manitoba (1) allowing in part an appeal by the city from a judgment of Williams C.J.K.B. (2) in favour of the C.P.R. in an action to enjoin the city of Winnipeg from imposing certain taxation.

C. F. H. Carson, K.C., H. A. V. Green, K.C. and Allan Findlay for the Appellant. As to whether the exemption is applicable to the part added to the City The City's contention is that the phrase "the City of Winnipeg", even though used without qualification, should be construed as meaning the City of Winnipeg as it existed at the time By-law 148 was passed. In the absence of such a qualification and of clear evidence to be derived from the facts and circumstances existing at the time or from subsequent conduct of the parties that such a qualification was intended, the phrase should be given its natural meaning, that is, the City as from time to time constituted. The facts and circumstances existing at the time of the By-law and the subsequent conduct of the parties indicate that it was not intended to give the phrase a restricted meaning but that it should have its natural meaning. *Charrington & Co. Ltd.* v. *Wooder* (3); *River Wear Commsrs.* v. *Adamson* (4). By-law 148 was submitted to

(1) (1950) 59 M.R. 230; 65 C.R.T.C. 129.
(2) (1950) 58 M.R. 117; 65 C.R.T.C. 1.
(3) [1914] A.C. 71.
(4) (1877) 2 App. Cas. 743 at 763.

and approved by the ratepayers of the city as then constituted on August 24, 1881, and less than a year later, on May 30, 1882, a considerable area was added to the city by c. 36 (Man.). On Sept. 20, 1882, By-law 195, the sole purpose of which was to amend By-law 148, was referred to the ratepayers of the city as extended. Had it been intended that the "City of Winnipeg" in By-law 148 was to have the restricted meaning, it might fairly be expected that this would have been indicated in the amending By-law. It was not. Similarly when the City became subject to the general Municipal Act of the Province, 1886, (Man.) c. 52, if the exemption was to be limited to the City as it existed prior to the 1882 extension, it might be expected that the City would have required some qualification to be inserted in the Act to make that clear.

According to the majority of the Court of Appeal the provision in clause 4(9) of By-law 148 that "this by-law shall take effect from and after" Sept. 21, 1881, indicated that the exemption was to be limited to the area of the City as it existed on the date the by-law came into effect. No such interpretation can be fairly put or any such inference drawn. There are at least two reasons why the by-law contained an express provision as when it was to take effect. 1st—the by-law recited that the debentures to be given by the City were to be payable in "twenty years from the date this by-law is to take effect"; 2nd—S. 931 of the City's charter 1875 (Man.) c. 50, provided that any by-law for contracting debts by borrowing money would only be valid if the by-law "shall name a day in the financial year in which the same is passed, when the by-law shall take effect". The subsequent conduct of the parties and the practices they followed under the agreement constitute a useful guide in determining the construction to be placed on the phrases in the agreement which are ambiguous. *Ottawa* v. *C.N.R.* (1). If the exemption clause had not been operative in the added area prior to the time when *The Railway Taxation Act,* 1900 (Man.) c. 57, came into force the City would have had the power and the duty to tax the property of the Company in that area. Realizing the exemption applied to it the City did not, except for an unsuccessful attempt to levy

(1) [1925] S.C.R. 494 at 497.

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school taxes, attempt to tax the Company's property situated either within the City's limits as constituted in 1881 or as subsequently enlarged. The fact that the property of the Company in the area added by the City after 1881 was not taxed from 1882 to 1900 and like other property of the Company was shown on the assessment rolls with the notation "exempt by By-law 148", is cogent evidence of the City's own interpretation of the phrase "within the limits of the City of Winnipeg".

Pursuant to the bond and covenant given by the Company it duly built its principal workshops for Manitoba in the City of Winnipeg as it existed at the date of By-law 148 whereby it was bound to "forever continue the same within the said City of Winnipeg." In 1903 it moved the workshops to a location in the area added to the City in 1882 and has continued them there ever since. No complaint was made by the City. This indicates that neither the Company nor the City regarded the phrase "within the limits of the City of Winnipeg" as used in clause 4(3) to have the restricted meaning now contended for. If it was not used in the restricted sense in clause 4(3) of By-law 148, it can hardly be suggested that the same phrase was used in a restricted sense in the exemption clause 4(8). In *City of Winnipeg* v. *C.P.R.* (1), the City did not contend that the exemption was inapplicable to the part of the City added after 1881, and therefore, that at the very least the property of the Company in that part of the City was liable for school taxes. This again indicates that the City regarded the agreement as meaning that the exemption applied to the added areas. Assistance may be furnished by other cases in which the court had to deal with a similar problem. In *City of Calgary* v. *Canadian Western Natural Gas Co.* (2), it was held that "the city" referred to in a franchise agreement was not restricted to the limits of the City as it existed when the franchise was granted. Other cases are: *Toronto Ry Co.* v. *Toronto* (3); *Union Natural Gas Co.* v. *Chatham Gas Co.* (4); *United Gas & Fuel Co. of Hamilton* v. *Dominion Natural Gas Co.* (5).

(1) (1900) 30 Can. S.C.R. 588.
(2) (1917) 56 Can. S.C.R. 117.
(3) (1906) Can. 37 Can. S.C.R. 460; 1907 A.C. 315.
(4) (1918) 56 Can. S.C.R. 253.
(5) [1933] O.R. 369; [1934] A.C. 435.

The question of whether the exemption is restricted in application to the City as it existed in 1881 is now *res judicata* by virtue of the *School Tax* case (1). The decision of the Court that the "property of the Company is exempt from any liability to contribute toward the support of the city schools", must be taken to have decided that the property of the Company in the area added to the City in 1882 was subject to exemption. *Hoystead* v. *Commissioner of Taxation* (2).

As to whether the exemption is applicable to the hotel and restaurant of the Company. The exemption as set out in clause 148 of By-law applies to "all property now owned or that hereafter may be owned" by the Company ". . . for railway purposes or in connection therewith". The question raised in the *Empress Hotel* case (3) was quite different. What was decided there was that that hotel within the meaning of s. 92(10) (*a*) of the B.N.A. Act and of ss. 2 (21) and 6(*c*) of *The Railway Act* 1919 (Can.) c. 68 was not *part of* the Company's "railway" as the expression "railway" was used in those sections. In the present case the question is whether the hotel is owned by the Company "for railway purposes or in connection therewith". In other words is the hotel owned by the Company for the purposes of the railway or in connection with the purposes of the railway. Even if the question had been the same in both cases, what the Privy Council decided as to the Empress Hotel could not bind this Court in considering the position of the Royal Alexandra Hotel. The decision of the Privy Council must be considered in the light of the facts of the case. The position here is different. The evidence as to the nature and functions of the hotel establishes clearly that it is owned "for railway purposes and in connection therewith."

The agreement dated August 4, 1906, whereby the Company agreed to make certain payments to the City, expressly recites that "the Company has built and constructed in the City of Winnipeg (in connection with its railway and the operation thereof) an hotel building..." Thus while the City had claimed that the hotel "was not originally included within the meaning of a railway or

(1) (1900) 30 Can. S.C.R. 558 at 564. (2) [1926] A.C. 155.
(3) [1948] S.C.R. 373; 1950 A.C. 122.

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railway enterprise" it recognized by the terms of the recital that the hotel was constructed "in connection with" the railway and its operation, a recognition that the hotel was owned "for railway purposes or in connection therewith" within the meaning of the exemption in By-law 148. The *Railway Taxation Act* up to 1909 exempted "the property of every nature and kind" of the Company, with certain exceptions not relevant, and there could be no doubt the exemption included the hotel. By the 1909 amending Act an additional exception was made namely "all lands and property held by the Company not in actual use in the operation of the railway." In 1914 and 1942 the Company was called on and agreed to make larger payments to the City, on neither occasion did the City base its claim for payment on the ground that the hotel and restaurant were not "in actual use in the operation of the railway" and that because of the change in the Act the conditions which existed when the agreement of 1906 was entered into no longer existed. Not only on the evidence of fact but also on the interpretation placed on the terms of the exemption by the parties to the agreement the hotel and restaurant constitute property owned for railway purposes and in connection with railway purposes and are thus within the exemption. As to whether the business tax is within the exemption. The majority of the Court of Appeal were of the opinion that under the terms of the City's charter the assessment for business tax was not an assessment of property and the tax itself was a tax on the person and not on property, and therefore that the exemption did not apply. Their decision was reached before judgment was delivered in *C.P.R.* v. *A.G. for Saswatchewan* (1). It is submitted that for the reasons given in the majority judgment in that case the judgment of the majority of the Court of Appeal in the present case on the question of business tax should be reversed.

Whether the agreement between the City and the Company set forth in By-law 148 as amended by By-law 195 is valid and binding is raised by the appeal of the City from the judgment of the Court of Appeal. So far as this question is concerned the City is the appellant and the Company the respondent. It is clear that all necessary steps

(1) [1951] S.C.R. 190.

were taken to render By-law 148 and amending By-law 195 valid and binding upon the City. If there was any doubt as to the powers of the City when the agreement was made to enter into the agreement and to enact the two by-laws, such doubt was removed by the Legislature of Manitoba. By statute, 1883 (Man.) c. 64, s. 6, the two by-laws were declared to be "legal, binding and valid upon the said Mayor and Council of the City of Winnipeg". The Supreme Court of Canada in *School Tax Case* (1) held that "the whole and every part of the by-law was in express words confirmed" by the validating act. The question has therefore been concluded against the City.

Another question arising out of the City's appeal is whether the Company had power to enter into the agreement. It is submited (i) That the Company had the status of a common law company and as such had power to enter into the agreement. (ii) It also had such power by virtue of its expressly enumerated powers. The following cases are submited in support of the first proposition. *Baroness Wenlock* v. *River Dee Co.* (2); *Bonanza Creek Gold Mining Co.* v. *The King* (3). As to the second submission, the Company had the power to enter into and perform the agreemnt by virtue of the expressly enumerated powers granted it by the charter. Even if it were held to have the status of a statutory company with powers restricted to those expressly enumerated, it is submitted that the Company had power to enter into and perform the obligations contained in the Contract. *Vide* para. 4 of the Charter; clause 7 and 8 of the Contract.

The agreement with the City was *intra vires* the Company as being expressly authorized by its charter or as being reasonably incidental to the business expressly authorized by its charter. *A. G.* v. *Mersey Ry.* (4); *A. G.* v. *Great Eastern Ry. Co.* (5); *Deuchar* v. *Gas Light & Coke Co.* (6). As to *Whitby* v. *G.T.R. Co.* (7), the facts and the conditions imposed differ and the case is to be distinguished.

W. P. Fillmore, K.C., F. J. Sutton, K.C., and *G. F. D. Bond, K.C.,* for the respondent. While the Company delivered to the City a form of bond and covenant in pur-

(1) (1900) 30 Can. S.C.R. 558 at 561.
(2) (1887) L.R. 36 Ch. Div. 675n.
(3) 1916 A.C. 566 at 583.
(4) 1907 A.C. 415 at 417.
(5) (1880) 5 A.C. 473 at 478.
(6) 1925 A.C. 691 at 695.
(7) (1901) 1 O.L.R. 480.

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ported compliance with the conditions and stipulations set out in By-law 148, s. 4 (3) and (4) such bond and covenant was of no force or effect as the Company had no power either expressly or by implication to give it. The fact that it was soon found necessary to remove the workshops outside the original limits of the City shows that the original site was not suitable and that the covenant to forever continue them within the City as then constituted was incompatible with the efficient operation and management of the railway. The directors of the railway had no power to enter into an agreement so onerous on the Company and binding on it for all time. It amounted to a covenant not to exercise its statutory powers. It was in conflict with the Company's contractual obligations to the government to forever efficiently maintain and operate the C.P.R. To ascertain the statutory powers of the Company it is necessary to turn to the Consolidated Railway Act, 1879 (Can.) c. 9, to which the charter is subject. The following sections appear material, ss. 2(2), 5 (1),(16), 6, and 7(1), (2), (8), (10) and (19). Nowhere in 1881 (Can.) c. 1, the incorporating Act or charter of the Company, nor in the Consolidated Ry. Act, 1879, is there any express power conferred on the Company to enter into a perpetual covenant to forever maintain their principal workshops for the main line at any designated location. On the contrary, there are clear implications that the Company had no such right or authority. The Company has not been able to point to any express power but it is argued that the Company has all the powers of a common law company on account of the charter having been dealt with under the Great Seal. As to the powers of the Company to enter into a perpetual covenant relating to the operation of the railway, the City relies upon *Whitby* v. *G.T.R.* (1); *Montreal Park & Island Ry. Co.* v. *Chateauguay & Northern Ry. Co.* (2); *Town of Eastview* v. *R. C. Episcopal Corporation of Ottawa* (3). The Company had no express or implied power to fetter or part with its statutory powers by entering into the covenant which was a condition precedent to tax exemption. Further any implications to be found in the charter and relevant statutes are to the contrary. The agreement must be construed as if the controversy had

(1) (1901) 1 O.L.R. 481. (2) (1905) 35 Can. S.C.R. 48.
(3) 47 D.L.R. 47.

arisen the day after the agreement was executed. You cannot test the question of *ultra vires* by waiting to see whether the corporation which acted beyond its express powers made a good bargain. *Re North Eastern Ry.* v. *Hastings* (1); *Charrington* v. *Wooder* (2). The agreement must be evaluated in the light of the circumstances existing at the time it was entered into. *Bank of N.Z.* v. *Simpson* (3); *River Weir Commsrs.* v. *Adamson* (4).

The City contends that the incorporating Act, the contract thereby approved and the schedule annexed together with the Consolidated Ry. Act, 1879, exhibit all the powers Parliament granted or authorized to be granted the Company and the doctrine of *ultra vires* applies. It submits in particular that (*a*) The incorporating Act was a special Act. (*b*) The recitals in the incorporating Act and in the charter show that the Governor in Council carried out the directions of Parliament, acted as its delegate in issuing the prescribed charter and did not purport to exercise and did not exercise the royal prerogative in that behalf. (*c*) The Governor in Council could not by royal prerogative create a railway company with all the powers, privileges and property rights granted the Company and the charter would have been invalid without the Act of Parliament. (*d*) Any intention to create a common law corporation is excluded by necessary implication.

The incorporating Act was not only a special Act but a special Act for a special purpose and the Company derives its legal existence wholly from the incorporating statute and the charter thereby prescribed and authorized. 1881 (Can.) ss. 21, 22, *The Railway Act*, 1879, s. 5 (1) and (16). Corresponding sections of *The Railway Act*, 1919, were discussed in *C.P.R.* v. *A.G. of B.C.* (5). It was there held that it was only by virtue of this Act that the Company had power to acquire hotels, etc., and it was the opinion of the Court or some members thereof that the C.P.R. Act of 1902 was a special Act. (Estey J. at 386, 87). This opinion is in line with *Elve* v. *Boyton* (6). In the *Bonanza Creek* case (7) Lord Haldane at 584: "In the case of a company the legal existence of which is wholly derived from the

(1) [1900] A.C. 260 at 266.
(2) [1914] A.C. 71 at 82.
(3) [1900] A.C. 182 at 188.
(4) (1877) 2 App. Cas. 743 at 763.
(5) [1948] S.C.R. 373; [1950] A.C. 122.
(6) (1891) Ch. 501.
(7) [1916] A.C. 566.

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words of a statute the company does not possess the general capacity of a natural person and the doctrine of *ultra vires* applies".

The recitals in the incorporating Act and in the charter show that the Governor-in-Council carried out the directions of Parliament and acted as its delegate in issuing a charter to the Company and did not purport to exercise and did not exercise the Royal Prerogative in that behalf. *Vide* s. 2 of the Act and the recital in the charter. *Cobalt* v. *Temiskaming Telephone Co.* (1). As the exact form of charter was prescribed by statute and agreed upon by the approved contract it is clear that the authority conferred upon the Governor General was merely to bring into existence the entity to be known as the Canadian Pacific Railway. The Governor General could not and did not purport to over-ride the Act of Parliament or the approved agreement by conferring additional powers on the railway company. The Governor-in-Council could not by Royal Prerogative create a railway company such as the C.P.R. and the charter would have been invalid if not authorized by an Act of Parliament. The *Canada Joint Stock Companies Act*, 1877 (Can.), c. 43, s. 3. *C.P.R.* v. *Notre Dame de Bonsecours Parish* (2).

Any intention to create a common law corporation is excluded by necessary implication. The Company derived its entire existence from the act and will of Parliament and did not require and did not receive any grant from the Crown either directly or through the Governor General as its delegate. It was brought into existence by direct legislative action. *Cobalt* v. *Temiskaming Telephone Co. supra* at 74, 75. *A.G.* v. *De Keyer's Royal Hotel* (3), *B.C. Coal Corp.* v. *The King* (4), *Canadian Bank of Commerce* v. *Cudworth Telephone Co.* (5), where the Bonanza Creek case was distinguished. In *Re Northwestern Trust Co. and the Winding-up Act* (6), the *Cudworth* case was followed and the *Bonanza Creek* case distinguished. *Toronto Finance Corp.* v. *Banking Corp.* (7) is also relied on.

The powers of the C.P.R. and the C.P.R. Act of 1902 are discussed at length in *C.P.R.* v. *A.G. for B.C.* (8) but

(1) (1919) 59 Can. S.C.R. 62.
(2) [1899] A.C. 367.
(3) [1920] A.C. 508.
(4) [1935] A.C. 500.
(5) [1923] S.C.R. 618.
(6) 35 Man. R. 433.
(7) 59 O.R. 278.
(8) [1948] S.C.R. 373.

the contention that the C.P.R. possessed all the powers of a common law corporation was apparently not made in the argument or referred to in any of the judgments. On this point the City refers to and relies on the judgment of Dysart J.A. in the court below, concurred in by Richards J.A. The majority of the judges in the court below failed to appreciate that the Company was not incorporated under a Joint Stock Companies Act but was a company incorporated for a special purpose and pursuant to a contract between the government and the promoters. They failed to appreciate that the Bonanza Creek Gold Mining Co. was incorporated by letters patent under the Ontario Joint Stock Companies Act and in the opinion of Lord Haldane purported to derive its existence from the Act of the sovereign and not merely from the words of the regulating statute and therefore possesed a status resembling that of a corporation at common law.

In the event of the Court holding that it was beyond the power of the Company to give the bond and covenant mentioned in By-law 148 as amended by By-law 195, the question arises whether the City is estopped from setting this up by reason of the judgment in *C.P.R.* v. *Winnipeg* (1). The power of the Company to give the bond and covenant was not discussed or even mentioned in the pleadings or judgment or reasons for judgment in the Supreme Court or in the Court below, and it is submitted that no issue was raised in the pleadings upon which this question could have been determined. It is submitted there can be no estoppel by *res judicata* unless everything in controversy in the proceedings where the question of estoppel is raised was also in controversy in the litigation which resulted in the judicial decision relied upon as an estoppel. *Outram* v. *Morewood* (2); Notes to the *Duchess of Kingston's case* (3) Spencer Bower's *Res Judicata* at p. 121 citing *Moss* v. *Anglo Egyptian Navigation Co.* (4); 13 Hals. pp. 411-12, s. 466 (2nd ed.) *Langmead* v. *Maple* (5); *Johanesson* v. *C.P.R.* (6); *Howlett* v. *Tarte* (7).

(1) (1909) 30 Can. S.C.R. 558.
(2) (1803) 3 East 346.
(3) Smith's Leading Cases, 12 ed. Vol. 2, p. 754.
(4) (1865) I Ch. App. 108.
(5) (1865) 18 C.B.N.S. 255.
(6) (1922) 32 M.R. 210.
(7) 10 C.B. (N.S.) 813.

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All that the court decided in the first action between the City and the Company was that by-law No. 148 as amended by by-law 195 was a valid by-law and that school taxes were included in the phrase "municipal taxes, rates and levies and assessments of every nature and kind." The question of whether it was *ultra vires* the company to give the bond and covenant was not fundamental to the decision in the first action, and it is not *res judicata* in the present action.

If the agreement set forth in By-law 148 was *ultra vires* the Company it cannot become *intra vires* by reason of estoppel, lapse of time, ratification, acquiesence or delay. *York Corp.* v. *Henry Leetham & Sons Ltd.* (1); *Toronto Electric Light Co.* v. *City of Toronto* (2). It is also submitted for the reasons mentioned in para. 341 of the reasons for judgment of the learned trial judge, the agreements between the City and the Company relating to the Royal Alexandra Hotel in 1906, 1914 and 1942, do not operate as an estoppel as contended by the plaintiff.

The judgment of the Chief Justice, Kerwin, Taschereau and Fauteux, JJ. was delivered by:

KERWIN J.:—The Canadian Pacific Railway Company appeals and the city of Winnipeg cross-appeals against a judgment of the Court of Appeal for Manitoba. The dispute between the parties hinges upon clause 8 of by-law 148 of the city, passed September 5, 1881, which clause reads as follows:

> 8. Upon the fulfilment by the said Company of the conditions and stipulations herein-mentioned, by the said Canadian Pacific Railway Company all property now owned, or that hereafter may be owned by them within the limits of the City of Winnipeg, for Railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.

The conditions and stipulations referred to are contained in preceding clauses of the by-law by which the company undertook to build, construct and complete, on certain property in the city, a substantial and commodious

(1) [1924] 1 Ch. 557.

(2) (1915) 33 O.L.R. 267; [1916] A.C. 84.

general passenger railway depot, and particularly clause 3, reading as follows:

> 3. The said Canadian Pacific Railway Company, shall immediately after the ratification of this by-law as aforesaid, make, execute and deliver to the mayor and Council of the City of Winnipeg a Bond and Covenant under their Corporate Seal, that the said company shall with all convenient and reasonable dispatch establish and build within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the Province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said province, and for ever continue the same within the said City of Winnipeg.

This by-law and an amending by-law No. 195 passed September 20, 1882, were ratified and confirmed by an Act of the Manitoba Legislature. It is admitted that the company fulfilled its obligations and with the exception of an abortive attempt by the city to impose school taxes, *Canadian Pacific Railway Co.* v. *City of Winnipeg* (1), no question arose between the parties as to the company's liability to taxation until, in the year 1948, the city attempted to assess and levy realty and business taxes, when this action was brought for a declaration that the company was not so liable.

The company succeeded at the trial but the judgment in its favour was set aside by the Court of Appeal by a majority, although there a majority were in agreement with the conclusions of the trial judge upon the first question involved, viz., the capacity of the company to enter into the agreement evidenced by by-laws 148 and 195. The trial judge considered that the company had the status of a common law corporation with powers analogous to those of a natural person and in that view the Chief Justice of Manitoba and Coyne J.A. and Adamson J.A. agreed. The latter also held, as had the trial judge, that in any event the expressly enumerated powers of the company gave it authority to make the agreement, and on this additional ground held the agreement *intra vires*. Richards J.A. and Dysart J.A. held that the company's powers were limited to those set forth in a special Act authorizing its charter but the former held that the agreement was within such powers and *intra vires* the company so that the latter was the only member of the court dissenting on the question as to the company's power to enter into the agreement.

(1) (1900) 30 Can. S.C.R. 558.

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On this first point I find it unnecessary to determine whether the city was incorporated by Royal Charter and hence had all the powers of a natural person, and therefore it is inadvisable to say anything upon the subject. The enumerated powers of the company, which appear in the reasons for judgment of several of the members of this court, and in the reasons for judgment in the courts below are sufficient in my view to authorize the company to do as it agreed, and as was subsequently carried out. Decisions like *Whitby* v. *Grand Trunk Railway Co.* (1) relied upon by the city, depend upon the terms of the enactments conferring the particular powers there in question. I might add that I have found it unnecessary in the consideration of this point, or any of the others, to deal with the company's argument that because of the decision in *C.P.R.* v. *City of Winnipeg* (*supra*), several of the matters now raised by the city are *res judicata.*

The second question is whether the exception is confined to property within the limits of the city existing at the date of by-law 148. Upon a review of all the terms of the by-law, and in view of the circumstances that existed at the time of its enactment, I have come to the conclusion that this question should be answered in the negative. If there be any ambiguity in the construction of those terms, which I do not think there is, the company's contention would be advanced by the fact that by the time by-law 195 was passed the company had executed part of its obligation on land that had been taken into the city subsequent to the enactment of by-law 148.

The third question, whether business taxes are included in the exemption is settled by the decision of this court in *C.P.R.* v. *Attorney General of Saskatchewan* (2).

The fourth question, whether the exemption is applicable to the company's Royal Alexandra Hotel and the restaurant in the railway station should be answered in the affirmative. Whatever bearing the company's enumerated powers under its charter might have upon the point as to the power of the company to build hotels need not be considered in view of the Act of 1902. Undoubtedly since then the company has such power and the Royal Alexandra Hotel and the restaurant fall in my opinion within the

(1) (1901) 1 O.L.R. 480. (2) [1951] S.C.R. 190.

words of the exemption: "all property owned or that hereafter may be owned . . . for railway purposes, or in connection therewith." The hotel property or restaurant need not be owned exclusively either for railway purposes or in connection with railway purposes. Other cases decided upon other provisions are not helpful but in connection with the point as to the limits of the city, as well as the point now under discussion, the arrangement set forth in by-law 148 as amended should be construed as is said by Lord Sumner in *City of Halifax* v. *Nova Scotia Car Works, Limited* (1), as "one of bargain and of mutual advantage." The decision of the judicial committee in *Canadian Pacific Railway Company* v. *Attorney General for British Columbia* (2), depended upon the construction of the British North America Act, 1867.

The appeal should therefore be allowed and the cross-appeal dismissed, both with costs, the judgment of the Court of Appeal set aside and that of the trial judge restored. The appellant should have its costs in the Court of Appeal.

RAND J.:—Of the several points raised, I shall deal with only one: the authority of the company to bind itself forever to maintain the principal workshops for the province in the city and the legal situation resulting from its absence.

On the first branch of the argument, that is, whether the company, from its incorporation by letters patent under the Great Seal of Canada, possesses all the powers of a common law corporation, the controlling consideration, as decided by the judicial committee in the *Bonanza Creek Co. case* (3), is the source from which the incorporating efficacy is drawn, whether from the statute or from the prerogative. On this, I should say that that source cannot be the prerogative alone for the reason that the authority to construct a railway, as given to the company, could not arise from it. The incorporation not only creates the capacities of the company but clothes it with essential powers and some of these latter impinge on common law rights and liberties for which legislation is essential. Nor can I infer from the statute an intention to authorize faculties proceeding from both sources: the incorporation

(1) [1914] A.C. 992.
(2) [1950] A.C. 122.
(3) [1916] A.C. 566.

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was of an entirety of objects, capacities and powers; and although special powers can by legislation be conferred on a common law corporation, I know of no authority under the prerogative to add capacities to a statutory corporation.

Then it is argued that the scope of the statutory endowment was sufficient for the covenant given. Viewing the question from the standpoint of the interest of the company as a private enterprise, it is difficult to see the creation of any obligation that violates the original compact of the shareholders *inter se*; but the principle of *ultra vires*, in addition to the general public interest in the authorization of corporate action, has public aspects of special significance in enterprises of the nature of that before us. Here was an undertaking conceived primarily for a high national purpose; it was designed as a bond to complete the scheme and organization of a Dominion extending from ocean to ocean by furnishing the essential means for the settlement and the utilization of the resources of its western half; and the company was made the beneficiary of substantial assistance from the public in money, lands and privileges. That object indeed exemplifies the importance of the initial construction; once permanent works were established, they would tend to draw to themselves an adjustment of other services and arrangements and the system of operations would become a settled accommodation which, in ordinary circumstances, would deepen its rigidity with the years. All this, in turn, would have its reflex in shaping the course and development of the social and business life of the community which it was to serve. But unusual circumstances, as at times eventuated in the early days of railway projects, might necessitate changes in transportation plans and arrangements and we might have such a situation as was presented to the courts of Ontario in *Whitby* v. *Grand Trunk Railway Co.* (1).

I do not find it necessary, however, to decide the question. I will assume that the company could not bind itself to continue forever the workshops, and the question is, what follows from that. The entire transaction must be kept in view, and for that purpose it is desirable to summarize the details.

(1) 1 O.L.R. 481.

By-law No. 148 (later embodied in by-law No. 195) was passed by the city on September 5, 1881 and its provisions were to take effect from September 21, 1881. Along with others it was confirmed by c. 64, Statutes of Manitoba, 1883, and by c. 52 of the Statutes of 1886. It was to become effective as a contractual obligation of the city on the performance by the company, to which it is to be observed the company did not bind itself, of certain conditions. These were the construction of the Pembina branch line to the southwest on or before February 1, 1883; the construction of a passenger depot in the city within the same time; and the giving of a covenant forthwith after the passing of the by-law to build within the city and with all reasonable despatch and forever to continue the principal workshops of the railway within Manitoba, and as soon as convenient to erect suitable stockyards. Upon the fulfillment of those three conditions, bonds of the city in the sum of $200,000 were to be delivered to the company and all property of the company within the city was thereafter and forever to be free and exempt from municipal taxation.

A deed of the land on which the station was to be built was to be delivered to the company upon the delivery of the covenant. On April 18, 1882 that deed was executed and it recites in the preamble that "the said bond (covenant) has been by the said company made, executed and delivered as required in the said by-law mentioned". Upon the further completion of the branch line and the depot within the time stated, the bonds were delivered under the authority of by-law No. 219 passed on March 30, 1883. In its preamble it is recited:

> AND WHEREAS the Canadian Pacific Railway Company mentioned in said by-law No. 195 have completed and performed all the conditions mentioned in the said by-law and in all other respects complied with the same: and it is desirable that the said trustee should be instructed to deliver the bonds mentioned therein, with the coupons still unmatured, to the Canadian Pacific Railway Company or their proper officer on that behalf.

Later, pursuant to the covenant, the workshops and the stockyards were constructed and the former have at all times since then been maintained. As from the same time, that is, the time for the delivery of the bonds, the exemption from taxation has been respected until 1948.

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The language of by-law No. 148 dealing with the furnishing of the covenant should be noticed:

> (3) The said Canadian Pacific Railway Company shall immediately after the ratification of this by-law as aforesaid, make, execute, and deliver to the mayor and council of the City of Winnipeg a bond and covenant *under their corporate seal* * * *

The company was clearly within its powers in building the branch line, depot, workshops and stockyards as it did; it would be absurd to say that the city could object to any part of that performance on the ground that the obligation to make it was invalid: and the remaining obligation to continue the workshops is clearly severable from that for their construction. But on the assumption I am now making the instrument cannot be said to furnish the entire consideration to which the city was entitled and there is, to that extent, a partial failure of a promissory character, although the performance has to this moment been completely and validly maintained.

The question of law then is this: whether a partial and severable failure of promissory consideration, followed by an entirety of irrevocable execution of the remaining consideration to the benefit of the other party, can be the ground on which a continuing and substantial obligation on the part of the latter can be repudiated. Rescission is obviously impossible as it has been from the moment the first work was completed. As early as 1888 the city could have taken the ground it now takes: and it is only the accident of the present search for grounds of escaping taxation exemptions that discloses the flaw today.

The significance of the contract to the city lay in the location of the railway and its centres of administration. The city was at the beginning of its life: it was seeking to establish itself as a focal point in the massive development of the West which was then in prospect. At that stage the action of the railway was of controlling importance. Transportation was the paramount agency in creating and promoting business and population groupings and probably no single factor has contributed so largely to the growth and wealth of what is now a great metropolis than the measures dealt with in the contract before us. The railway system is now too deeply integrated with the settled life of the province and the entire West to permit of any major readjustment: the city has attained a dominant position

on the prairies, and the removal of the workshops could have no more than a minor effect on its economic life or interest. In other words, the city having absorbed irrevocably the substance of the benefit under the contract seizes upon this item which may never manifest itself in default, and which even in actual breach would create little more than a ripple on the surface of its economy, to justify repudiation notwithstanding that the courts, as I shall endeavour to show, could deal effectively with such a default should it ever arise.

Both parties assumed the capacity of the company to make the covenant and acted under a common mistake of law; as executed it was in the precise form stipulated by the by-law; and it was accepted as a fulfilment of one of the conditions upon which the exemption from taxation became effective. On the strength of that acceptance, the construction of the workshops and stockyards was carried out. In these circumstances, the city is now estopped from taking the position that the exemption clause in the by-law never became effective; the coming into force of that provision is in the same category as to effectiveness as was the delivery of the bonds to the company: it is the same as if a new by-law had then been passed. The exemption provision became therefore and remains in effect, and in the absence of its repeal, there is today no authority in the city to tax the company's property.

The principle of enforcement in equity of contractual obligations with compensation is long established, and its employment here is dictated by the reasons on which it is based. Its general application has been confined to contracts for the sale of land. But the sale of land was part of the consideration here; the remainder was and is an indirect interest in and a beneficial consequence resulting from the operation of works on land. The controversy is broadly, then, within the scope of matters in which the principle has in the past been employed: there is not merely a close analogy, the actual items of land and interest constitute the basic subject-matter.

The circumstance that differentiates the situation here from the generality of *ultra vires* contracts is the characteristic of time attached to the physical acts of performance. Those acts by both parties are *intra vires*: the exemption

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was confirmed by the legislature; the workshops may, in the discretion of the company, be continued within the city limits forever, indeed the existing circumstances may in fact compel that performance, and the city would then receive from the company the whole of what, by the contract, it sought. It is only the substitution of obligation for discretion in that continuance that raises the difficulty.

The company could, at the outset, have validly accepted and can today accept the future tax exemption on the condition that if at any time the workshops should be removed, the amount of the taxes so saved would be recouped to the city to the extent of damages it might suffer from the removal: it would be the return of a benefit conditioned on a failure to maintain a work within the power of the company to create, maintain, or abandon. Such an arrangement would, I think, be clearly within the company's powers expressly or impliedly conferred by the incorporating statute as well as the Railway Act.

That is closely analogous to one case of specific performance with compensation. When a vendor seeks to enforce an agreement, compensation is a voluntary condition of relief; the vendor enters Court offering to give up a portion of the price of what he promised to and cannot fully convey. This may, roughly, be equivalent to damages, but it is not in law of that character.

Such a mode of adjustment may here be said to substitute a conditional for a promissory term in the contract: instead of mutual promises to maintain and exempt, the obligations would be, to exempt so long as the workshops are maintained and to recoup should that cease. It is modifying the legal situation no doubt, but that would not be novel in equitable administration: all equitable relief modifies the legal situation; and since, at law, the parties would now be left as they are, that neither of the outstanding obligations would be enforced, it is just such a result that the principle of relief against unjust enrichment is in every case called in to redress.

In this exceptional conjunction of circumstances, to carry a rule of *ultra vires* to an ultimate logic would, in the presence of the institution of equity, be its reduction to absurdity. At such a point, logic must yield to common sense as well as to justice. The city, by reason of these

matters, has drawn upon itself an equity of obligation; it would be inequitable and unjust while it is enjoying to the full the actual benefits for which it bargained to refuse to pay the price for them. There is no question of enforcing an *ultra vires* promise against the company nor of exacting performance by the city as the consideration of an *ultra vires* promise. The position of the city before any step was taken to withdraw the exemption, a position of full current but unenforceable performance on both sides, can in substance, from now on, be preserved by the application of established principles; and as equity looks at the substance and not the form of what is presented to it, to maintain that position would accord with the basic reason for equitable interposition at any time.

As the company asserts the covenant to be good, it is as if it were proffering an undertaking, in the event of the removal of the workshops from the city, to recoup to the city out of the benefit received through the future tax exemption, such amount of compensation as the Court might determine to be the loss the city might thereby sustain; on that basis, the declaration and injunction asked for should go.

In all other respects, I concur in the views reached by my brother Kellock whose reasons I have had the privilege of reading.

KELLOCK J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba in an action brought by the appellant for a declaration that certain property owned by it in the respondent municipality is entitled to exemption from municipal assessment under by-law No. 148 as amended by by-law No. 195 of the city, both having been validated by provincial legislation. The appellant succeeded at the trial, but, while the agreement evidenced by the by-laws was upheld on appeal, it was construed so as to deprive the appellant of the essential relief claimed. Four questions are involved:

(1) the capacity of the appellant to enter into the agreement evidenced by the by-laws;

(2) whether the exemption is confined to property within the limits of the city existing at the effective date of the by-law;

(3) whether business taxes are included in the exemption; and

(4) whether the exemption is applicable to the appellant's Royal Alexandra Hotel.

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As to the first question, it was held by the Chief Justice, Coyne and Adamson JJ.A., in agreement with the learned trial judge, that the appellant has all the powers of a common law corporation and accordingly had capacity to enter into the agreement in question. Dysart and Richards JJ.A. were, however, of opinion that the appellant had only statutory powers. The former considered that the agreement was not within those powers. The latter was of a contrary opinion.

With respect to the other questions, the opinion of Richards, Dysart and Adamson JJ.A. was in favour of the respondent. The Chief Justice and Coyne J.A. dissented.

By-law No. 148, passed September 5, 1881, recites that it is desirable that a line of railway southwesterly from the city should be built for the purpose of developing and advancing the traffic and trade between the city and the southern and southwestern portions of Manitoba; that it is also desirable to secure the location of the workshops and stockyards of the company for the province of Manitoba at the city of Winnipeg, as a central point on the *main* line of the railway and the several branches thereof, and that it is expedient for the city, in consideration of the agreement of the company to do these things, to lend their aid to the company by granting to the company debentures of the city to the amount of $200,000, and by exempting property of the company

> now owned or hereafter to be owned by the said Railway Company for Railway purposes within the City of Winnipeg from taxation forever.

A suitable site for a station was also to be conveyed by the city to the company.

The by-law authorizes the issue and delivery of the debentures upon fulfilment by the railway company of certain conditions, namely,

> 1. Construction of the railway mentioned in the recital by February 1, 1883;
>
> 2. Construction by the same date of a station on the lands to be conveyed to the company by the city;
>
> 3. Delivery by the company, upon ratification of the by-law by the ratepayers, of a formal covenant that the company would, with all convenient and reasonable dispatch, establish and build "within the limits of the city of Winnipeg" their principal workshops for "the main line within the province of Manitoba, and the branches radiating from the city," and "forever continue the same within the said city of Winnipeg";

4. The covenant should extend also to the erection within the "city of Winnipeg" of stock or cattle yards suitable for the central business of the main line and the said branches.

The covenant does not of itself stipulate the continued maintenance of the stockyards within the city, but the recital states that the company had so agreed.

With respect to the question of capacity, I agree with the conclusion of Richards and Dysart JJ.A. that the appellant has not the powers of a common law corporation. Appellant was incorporated by letters patent under the Great Seal issued pursuant to s. 2 of the statute of Canada, 44 Vict. c. 1, assented to on February 15, 1881. The statute approved of a contract dated October 21, 1880, for the construction of "the Canadian Pacific Railway" as described in the Act of 1874, 37 Vict. c. 14, in part by the company and in part by the government, the whole of which was to become the property of the company, which obligated itself forever thereafter to "efficiently maintain, work and run" the same. Paragraphs 21 and 22 of the contract read as follows:

21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the company in the form hereto appended as Schedule A.

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the company, shall apply to the Canadian Pacific Railway.

The schedule referred to in para. 21 above provides by para. 1 that certain individuals,

with all such other persons and corporations as shall become shareholders in the company hereby incorporated, shall be and they are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway".

Para. 4 reads as follows:

All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

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Para. 17 contains provisions similar to para. 22 of the contract, and by paragraphs 18 to 23 inclusive, certain sections of the Consolidated Railway Act are varied in their specific application to the company. The schedule, in subsequent sections, bestows further specific powers.

With respect to the enacting provisions of the statute itself, s. 2 reads as follows:

> For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the *Canada Gazette*, with any order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.

The appellant contends that in the change from the method of incorporation provided for by the contract, namely, by special Act in the form of the schedule appended to the contract, to the method provided for by s. 2 of the statute, namely, by letters patent under the Great Seal, Parliament had in mind the decision in *Ashbury* v. *Riche* (1), decided some six years earlier, and intended that the ambit of the powers of the appellant company should not be restricted in accordance with the principle which had been applied in that case, but should be those of a common law corporation. Appellant stresses that the letters patent recite that they are granted not only under the authority of the Special Act, but also under the authority of

> "any other power and authority whatsoever in us vested in this behalf,"

and counsel refers to the judgment of the judicial committee in the *Bonanza Creek* case (2).

As stated by Viscount Haldane in the course of his judgment in that case, the question thus raised is simply one of interpretation of the language employed by Parliament. The words employed, to which the corporation owes its legal existence, must have their natural meaning, whatever that may be. Their Lordships, after tracing the prerogative power as to the incorporation of companies by the Governor

(1) (1875) L.R. 7 H.L. 653. (2) [1916] A.C. 566.

General and the Lieutenant Governors respectively, considered the question whether there was, in the case before them, any legislation of such a character that the power to incorporate by charter from the Crown had been abrogated or interfered with to the extent that companies so created no longer possessed the capacity which would otherwise have been theirs. Reference is made to the Act of 1864, 27-28 Vict. c. 23, which authorized the Governor to grant charters for incorporation of companies for certain purposes named in the statute. S. 4 provided that every company so incorporated should be a body corporate "capable forthwith of exercising all the functions of an incorporated company as if incorporated by a special act of Parliament."

Their Lordships construed this provision as enabling, and not as intended to restrict the existence of the company to what could be found in the words of the Act as distinguished from the letters patent granted in accordance with its provisions. They therefore held that the doctrine of *Ashbury* v. *Riche* does not apply where the company purports to derive its existence from the act of the Sovereign and not merely from the words of a regulating statute.

It is to be observed that the Act of 1864 and the Dominion and provincial Companies Acts in question in the *Bonanza* case were each enacted at a time when the prerogative power to incorporate was unaffected by other legislation. In the case at bar, however, when the Act of 1881 was passed, any power to incorporate a company for the construction and working of railways by virtue of the prerogative, had previously been expressely abrogated by s. 3 of the Joint Stock Companies Act of 1877, 40 Vict. c. 43, and prior thereto by s. 3 of the Act of 1869, 32-33 Vict. c. 13. Accordingly, the language in para. 1 of the letters patent, so much relied upon by counsel for the appellant company, namely, "and of any other power and authority whatsoever in us vested in this behalf," is meaningless, there being in 1881 no power vested in the Governor General in Council with respect to the incorporation of a railway company, apart from that bestowed by the statute of 1881 itself. One must therefore find in that Act, or not at all, an intention

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to revive the prerogative for the purpose of the incorporation of the appellant company; *Attorney General* v. *De Keyser's Royal Hotel* (1), particularly at pp. 526 and 539-540.

Before considering the language of the statute, it is not irrelevant to observe that had it been the intention of Parliament to create the appellant company with the powers of a common law corporation, one would have expected, at that date at least, that something in the nature of express language would have been used. That the decision in *Ashbury* v. *Riche* had nothing to do with the form of s. 2 of the statute is, I think, indicated by the provisions of ss. 14 and 15 of the Canadian Pacific Railway Act of 1872, 35 Vict. c. 71, which make provision for incorporation by letters patent, in the circumstances there mentioned, of a corporation for the construction and operation of the railway later to be the subject of the contract with the appellant. In the case of these sections, it is not possible, in my opinion, to say that by the letters patent so authorized, a common law corporation would have emerged.

Moreover, in my opinion, it is not possible to construe s. 2 of the statute of 1881 as enabling in relation to a co-existent power to incorporate, existing apart from the statute. Such a power did not then exist. Further, the authority given by s. 2 of the Act of 1881 for the purpose of incorporating the persons named in the contract, and of granting to them "the powers necessary to enable them to carry out the said contract according to the terms thereof", was to grant to them "in conformity with the said contract" a charter conferring upon them

> "the franchises, privileges and powers embodied in the schedule to the said contract."

Pausing there, I find nothing in this language which operates to constitute such letters patent, letters issued by virtue of any royal prerogative or any authority apart from the statute itself, and in my opinion, the following language,

> and such charter, being published * * * shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract,

extends in no way the effect of the preceding language.

(1) [1920] A.C. 508.

The contract itself contemplates nothing more than a statute of incorporation with the powers mentioned in the schedule to the contract. The contractors themselves contracted with the government on that basis, and it surely cannot be supposed that it was in the minds of any of the contractors, or of the government, that the capital of the corporation to be created could be devoted to any purpose but the construction and continued operation of the railway therein described. It was an express term of the contract (para. 21) that the contractors were to be bound only in the event of an Act of incorporation being granted to the company "in the *form* herein appended as Schedule A." That schedule contemplates no powers being granted to the company apart from those contained within the four corners of the schedule itself. Accordingly, in my opinion, it was intended, by the words last quoted above, to satisfy the terms of para. 21 of the contract and to do no more. I think it is impossible to read into the legislation some bestowal of power upon the company outside of that which was contracted for.

It would no doubt be speculation as to why incorporation by letters patent was adopted rather than by a special statute. It is to be observed, however, that the letters patent were issued the very day after assent was given to the statute, so that time seems to have been an important factor. It may have been thought that to have incorporated all the terms of the letters patent in 44 Vict. c. 1 itself would have been awkward from a drafting standpoint and that an additional statute would have consumed more time, and getting on with the business of the transcontinental railway was an urgent matter. However that may be, it would seem, if the appellant's contention on this point be correct, that under a statute approving of a contract, a very large departure from the contract was at the same time effected in a very unobtrusive way. In my opinion, however, upon the true construction of the language of the statute, no such intention can fairly be gathered.

The subsequent legislative history of the appellant company, for what it may be worth, is consistent with this interpretation. It may be said, and it was said on behalf of the appellant, that the subsequent legislation granting additional powers to the appellant company, was merely

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obtained *ex abundanti cautela.* Such a theory, however, is rather negatived by the preamble to the Act of 1890, 53 Vict. c. 47 to which no reference was made on the argument. That Act recites *inter alia,*

> and whereas several other railway companies are duly empowered to enter into agreements whereby the Canadian Pacific Railway Company may work, lease, or obtain running powers over their respective lines, and the Canadian Pacific Railway Company, *not having the requisite legislative authority for taking part in such an agreement,* has prayed that the necessity for special legislation, *giving such authority in each case* in which it may find it expedient to do so, be avoided, and that Parliament give it the general authority hereinafter mentioned * * *

It might be said that this recital refers not to the creation of further capacity on the part of the appellant company, but to the granting of further rights, and such an answer might account sufficiently for s. 6 of the statute which authorized the appellants to enter into certain arrangements with Canadian companies. Such an explanation cannot account, however, for s. 7 which authorizes the appellant to make similar arrangements with companies outside Canada. Parliament can only create capacity to receive rights outside Canada. It cannot create the rights themselves. While the above recital may not be conclusive, and while it cannot control, if on a proper construction of the Act of 1881 the situation were otherwise, the position clearly appearing on the recital indicates that the conclusion to which I have come as to the proper construction of the incorporating Act is the one entertained by the appellant itself.

Reduced to its essence, the contract, for the performance of which the appellant was incorporated, was for the construction by the company of certain parts of the railway, and, upon the completion and conveyance to the company of the parts constructed by the government, for the permanent operation of the whole by the company. Apart from certain specific powers which are not relevant, the powers actually conferred upon the company by para. 4 of the letters patent were all the franchises and powers necessary or "useful" to the company to enable it to cary out, perform, enforce, use, and avail itself of every condition, stipulation, obligation, duty, right, remedy, privilege and advantage agreed upon, contained or described in the contract. It is the contention of the respondent that the covenant of the

appellant with respect to the maintenance of the shops at Winnipeg amounts to a covenant not to exercise its statutory powers.

It is said for the respondent that the removal in fact of the appellant's shops from their original location to a point outside the 1881 boundaries of the city, and the establishment of additional stockyards outside those boundaries, shows that the covenant in question is incompatible with the efficient operation and management of the railway required by the contract with the Crown. It is said that other unforeseen events, such as excessive floods, might not only interfere with or prevent efficient operation, but might even yet render necessary the entire removal of the shops and yards from the city.

The respondent also points to para. 13 of the contract which reads,

> The company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of railway hereby contracted for, as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the western section at Kamloops by way of Yellow Head Pass.

and contends that a later event of the character already mentioned might have resulted in the establishment of the centre of population at Selkirk instead of at Winnipeg, and that the obligation to build and forever maintain the shops for the main line at Winnipeg, involving as it did an obligation (I quote from respondent's factum) "by necessary implication to establish Winnipeg as a terminus of the railway in lieu of preserving the same at Selkirk," or to establish Winnipeg as a "central point" on the main line, was in conflict with para. 13.

It may be pointed out, however, that the obligation of the appellant under the covenant was not to establish Winnipeg as a "central point" on the main line. What the appellant covenanted to do was to establish and build within the city limits their "*principal* workshops for their main line of railway within the province of Manitoba, and for the branches thereof, radiating from the said city" and to continue them forever within the city, and it would seem obvious that shops for the branches radiating "from" the city at least, could hardly, from a practical point of view, be located elsewhere than at Winnipeg.

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I do not think, either, that the covenant involved any implied obligation upon the appellant to substitute Winnipeg for Selkirk as a "terminal point" of the main line. There appears to be involved in this contention of the respondent that the maintenance of the principal workshops at Winnipeg necessarily involved Winnipeg as a "terminal" or "divisional" point from the standpoint of the operation of the railway, and that as Selkirk and Winnipeg are only some twenty miles apart, the latter would be elbowed out of its position as such a point, contrary to the statute. This argument is, in my opinion, founded on a misconception of the statute.

Para. 1 of the contract defines four sections of the main line, with Selkirk as the western end of the Lake Superior section, which was to be built by the government, and the eastern end of the central section which was to be completed by the appellant. The "terminal points" mentioned by para. 13 have nothing to do, in my opinion, with the operation of the railway but only with construction.

It may perfectly well have been, and probably was intended when the statute was passed, that from Selkirk west the main line would run north of Winnipeg, but under the terms of para. 13, the appellant with the concurrence of the Governor in Council, was free to construct the central section of the main line from Selkirk to Winnipeg and then west if it saw fit.

As appears from para. 15 of the letters patent, there was already in existence, at the time of the contract, a branch line of railway from Selkirk to Pembina. It appears also from the schedule to c. 13 of the Act of 1879, 42 Vict., that this line was in course of building, and by para. 2 of the contract contained in the schedule to the Act, the government had undertaken to complete the line by August 3rd of that year. Winnipeg or Fort Garry was, of course, on this line. Chapter 14 of 42 Vict. establishes this, if it needs to be established.

P.C. 1458, dated November 19, 1881, shows that the main line had by that time been routed through Winnipeg. That this in no way interfered with the position of Selkirk is clear from the Act of 1882, 45 Vict. c. 53. This statute amends the very paragraph of the contract under consideration, viz., para. 13, with respect to a change in the

location of the railway through the Yellow Head Pass, but the statute, by s. 1, shows clearly that Selkirk was still on the main line.

If it were necessary to decide as to whether or not the covenant to build and forever maintain the workshops at Winnipeg was a covenant which the company could validly enter into, regard should be had to the principle laid down by Lord Selborne in *Attorney General* v. *Great Eastern Ry. Co.* (1), namely, that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized ought not, unless expressly prohibited, to be held by judicial consideration to be *ultra vires*. However, I do not consider it necessary to decide the question for the reason that, assuming the covenant to have been beyond the power of the company, the respondent, in the circumstances here present, is not now entitled to take the position that its obligation with respect to the exemption from taxation, is no longer binding upon it.

The position of the respondent, as set out in its factum, is that the "purported agreement" between the parties is void for want of mutuality and that no consideration for the tax exemption was received by the respondent for the agreement or bylaw or the granting of the exemption from taxation, and that the plaintiff did not as a result of or in reliance upon said agreement or any term or terms thereof, exercise any forbearance or change its plans or incur any expense or make any investment or in any way change or alter or prejudice its position or the location, construction or operation of its railway or of any works connected with its railways, or give any consideration. It is said that the giving of the bond and covenant amounted to a covenant by the appellant not to exercise its statutory powers which it had no right to do.

In my opinion, it is plain that both parties contracted on the basis that the appellant had the power to give the covenant in question, and each was in as good a position as the other to ascertain whether or not that was so. The contract has been fully executed except as to the future performance on the part of the city as to the maintenance of the tax exemption, and on the part of the appellant as to the maintenance of its shops at their present location.

(1) (1880) 5 A.C. 473.

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With respect to the point taken as to the lack of power on the part of the company, the view expressed by Lord Cairns L.C. in *Ashbury's* case at p. 672, is, in my opinion, applicable. There is nothing involved in the covenant, in my view, which "involves that which is *malum prohibitum* or *malum in se* or is a contract contrary to public policy and illegal in itself." The question is not "as to the legality of the contract; the question is as to the competency and power of the company to make the contract." The covenant here in question, on the assumption it was beyond the powers of the company, which I make for present purposes, was simply void. Being *ultra vires* the appellant, and therefore void, there can be no question of damages. Otherwise, the case would fall, in my opinion, within the principle of *Boone* v. *Eyre* (1). In that case, the plaintiff had conveyed to the defendant by deed the equity of redemption of a plantation together with the stock of negroes upon it in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully in possession of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity, while the plea was that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. On demurrer, it was held by Lord Mansfield that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant and shall not plead it as a condition precedent. Lord Mansfield went on to say,

> If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

In Carter v. *Scargill* (2), there was in question an agreement between the parties for the sale and purchase of a business the estimated profit of which was £7 per week,

(1) 1 H. Bl. 273 note; 126 E.R. 160. (2) (1875) 10 L.R.Q.B. 564.

and it was agreed that in the event of it being proved by the books of the vendor that the profit should be as stated, the purchaser was to pay the purchase price in specified installments. Possession was taken of the business by the defendant and resold, but in an action to recover the balance of the installments, the position was taken that the plaintiff had not established that the business was as profitable as stated. It was there held by Cockburn C.J., Quain and Field JJ. that that which might have been a condition precedent had ceased to be so by the defendant's subsequent conduct in accepting less than his bargain, with the result that the condition went only to a portion of the consideration and that not a substantial portion.

While the present case is not one in which the respondent may be compensated in damages should it suffer any in the event that the assumed obligation of the appellant to maintain the shops at Winnipeg cannot be enforced against it, I think that the view more fully expressed by my brother Rand as to the proper relief in equity is the correct one. It is past question, in my view, that the case is one for equitable relief rather than that the respondent, having obtained to date everything for which it originally stipulated with the exception of a binding agreement in which the existing status of the shops will be maintained, cannot in conscience be allowed to take the position that its agreement with respect to the tax exemption is no longer to be enforced against it. I think the facts are eminently such as to call for the application of the principle of compensation insofar as performance on the part of the appellant may fall short of that which it would have been obliged to provide if the covenant on its part, and which it asserts to be binding, were binding in law. I therefore agree on this branch of the case with the order proposed by my brother Rand.

It is next argued for the respondent that the obligation to maintain the workshops and stockyards "within the city of Winnipeg" means within the limits of the city as they existed at the date of the by-law, and that the removal of the workshops in 1903 from their location within the original city to a location outside that area but within the limits of the city at the time of removal, was a breach of contract. It is contended that even if this did not put an

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end to the exemption *in toto*, no lands of the appellant company outside the existing limits at the date of the contract are entitled to the exemption.

In my opinion, this contention is without merit. Under the terms of para. 8 of the by-law, the exemption was to extend to

> all property now owned, or that hereafter may be owned by them (the company) within the limits of the city of Winnipeg, for railway purposes, or in connection therewith.

This provision itself looks to the future, and on the natural reading of the language employed, the words "within the limits of the city of Winnipeg" should be held to mean within the limits of the city as they shall from time to time exist. The whole object of the agreement was to induce the continued development and growth of the city, and that being so, it would be in contradiction to the plain meaning of the language to restrict the paragraph to the limits then existing. That that is not even a plausible contention is, I think, borne out by reference to the first recital of the by-law, which is as follows:

> Whereas it is desirable that a line of railway southwesterly from the city of Winnipeg, towards the westerly limit of the province of Manitoba, through the Pembina Mountain District should be built for the purpose of developing and advancing the traffic and trade between the city of Winnipeg and the southern and south western portions of the province.

When one looks at the words "the city of Winnipeg" where they secondly appear in the above recital, it is plain, in my opinion, as in the case of para. 8, that the city spoken of there, with respect to which traffic and trade was to be "developed and advanced," meant the city of Winnipeg as it should from time to time develop and expand.

It is pointed out on behalf of the respondent that while by-law 148 was passed on September 5, 1881, and the amending by-law on October 30, 1882, the amended by-law was to take effect from September 21, 1880, and it is contended that had the agreement been intended to apply to any territory not within the city at the effective date of the by-law, some express language to that effect would have been employed. In my opinion, this is not the situation to which these provisions were directed.

In the first place, the by-law provides for the issue of debentures payable in twenty years from the day "this by-law takes effect." By para. 1, the debentures were made

payable on September 20, 1901, and accordingly, the date upon which the by-law should come into operation had to be fixed, as it was fixed by para. 9, on September 21, 1881. In addition, the provincial Act of 1875, 38 Vict. c. 50, provided by s. 931 that any by-law for contracting debts by borrowing money would be valid only if the by-law should name a day in the financial year in which the same was passed when the by-law should take effect. I think it is clear, therefore, that the contention under consideration is not well founded.

It is also contended on behalf of the appellant that the exemption extends to so-called business taxes. As this point is concluded in this court by our decision in *Canadian Pacific Railway Company* v. *Attorney General for Saskatchewan* (1), effect must be given to this contention.

The remaining question is as to whether or not the exempting provision extends to the Royal Alexandra Hotel and restaurant of the appellant company. The hotel is a modern, high class structure of a well known type, having six floors with 445 rooms available for guests. It is one of a system maintained by the appellant company across the country. While it serves to draw traffic to the appellant's railway, it is not only available to the travelling public generally, but serves the local community in providing suitable space for entertainment and public functions as well as for more or less permanent guests. It is also used by the appellant to lodge employees from time to time, and it is a convenient place for the holding of railway conferences, and passengers are, at times, accommodated there in emergencies. The hotel laundry looks after some of the laundry for the railway.

It is to be observed that the only property which the by-law exempts is property owned by the appellant for "railway purposes or in connection therewith," i.e. in connection with "railway" purposes. As pointed out by their Lordships in *Canadian Pacific Railway* v. *Attorney General for British Columbia* (2), a company may be authorized to carry on, and may in fact carry on, more than one undertaking, but merely because the company is a railway company, it does not follow that all its activities must relate to its railway undertaking. As shown by the evidence,

(1) [1951] S.C.R. 190; 1 D.L.R. 721. (2) [1950] A.C. 122.

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the first Canadian Pacific hotels were established in the Rocky Mountains. Because of the very heavy grades existing in the early days, the trains were not able to have diners, and it was necessary that they be stopped at convenient points to enable the passengers to take food and rest. That day has long since passed, and hotels of the type at present under consideration do not owe their existence to any necessity in connection with the operation of the railway proper.

As pointed out earlier in this judgment, the company was incorporated for the purpose of carrying out the contract of October 21, 1881, and for no other purpose. The power to erect the mountain hotels was no doubt incidental to the powers conferred upon the company at its incorporation, but until 1902 the company did not have the power to go into the hotel business in connection with such hotels as the Royal Alexandra at Winnipeg and the Empress at Victoria.

Their Lordships in the *Empress* case state that the case with which they were dealing was not the case of an hotel conducted solely or even principally for the benefit of travellers on the system of the appellant company, and that there was little to distinguish the Empress Hotel from an independently owned hotel in a similar position. The same applies with equal force to the Royal Alexandra. No doubt, the fact that there is a large and well managed hotel at Winnipeg does tend to increase traffic on the appellant system, and it may be that the appellant's railway business and hotel business help each other, but that does not prevent them from being separate businesses or undertakings which, in my view, is the case so far as the Royal Alexandra is concerned.

In my opinion, therefore, the conduct of such an hotel as the Royal Alexandra was not within the contemplation of the contracting parties at the time of the passing of by-law 148, and I do not think that such an hotel is owned by the company for "railway" purposes or "in connection therewith" within the meaning of the by-law. The fact that the business of the hotel may be operated in connection with the business of the railway does not, in my

opinion, make the hotel exempt property within the meaning of para. 8 of the by-law. That the hotel is in physical connection with the appellant's Winnipeg railway station does not affect the matter.

By an agreement of August 4, 1906, entered into between the appellant and the respondent at a time when, by c. 57 of the Statutes of Manitoba, 63-64 Vict. (1900) s. 18, the property of the appellant company within the city was exempt from municipal taxation, it was arranged that the appellant should pay a stated sum to the respondent in lieu of taxation in respect of the hotel "if the same were anyway liable to any taxation." The appellant points to the first recital in the agreement which states that the company has built "in connection with its railway and the operation thereof", as a recognition that the hotel is owned by the company in connection with "railway purposes" within the meaning of by-law 148. The agreement contains a further recital, however, that the "city has claimed that said hotel property should be made subject to municipal taxation on the grounds that an hotel was not originally included within the meaning of a railway" enterprise. In view of this, I think that the first recital cannot be taken as a recognition that the hotel was to be considered as within the meaning of the agreement of 1881, but rather the contrary.

I further think that the words in the first recital, "in connection with its railway and the operation thereof," have not the same meaning as the words, "property owned for railway purposes or in connection therewith," in by-law 148. In the case of the latter, the property dealt with was property owned for the purpose of the construction and operation of the railway described in the statute of 1881, while the property referred to in the first recital of the agreement of 1906 was property acquired by virtue of the express power granted to the appellant by s. 8 of its Act of 1902 by which it was authorized to conduct an hotel business "for the purposes of its railway and steamships and in connection with its business" of operating the railway, which in 1881 had been its exclusive business. The first recital in the agreement of 1906 is evidently based on this legislation. Moreover, as by-law 148 and the amending by-law required and received validation at the hands of

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the provincial legislature, it was not competent for the city, without further legislation, to vary by any act or conduct, the terms of the agreement evidenced by the by-law.

In my opinion, therefore, appellant derives no assistance from anything contained in the agreement of 1906. In 1909, amending legislation was passed by the provincial legislature which deprived the hotel of its exemption from municipal taxation, following which, in 1914 and 1942, further agreements were made between the parties with respect to payment to the city by the appellant in respect of the hotel property in lieu of municipal assessment. The appellant again says that these agreements are a recognition that the respondent construed the exemption in by-law 148 as extending to the hotel in question. I do not think, however, that, apart from enabling legislation, it was competent for the city in this way to extend the meaning of the words used in 1881, or to exempt property, which by general law was subject to taxation. I think, therefore, the appellant's contention with respect to the hotel fails. We heard no argument that, in this event, the restaurant could be considered in any other position.

In the result, the appellant succeeds substantially, and should have three-quarters of the costs in this court and in the Court of Appeal. The judgment of the trial judge should be restored with the variation indicated above as to the hotel and restaurant. The order as to costs at trial should not be interfered with.

The judgment of Estey and Cartwright JJ. was delivered by:

ESTEY J.:—The Canadian Pacific Railway Company (hereinafter referred to as the company) contends that it is exempt from realty and business taxes assessed and levied in the year 1948 by the city of Winnipeg (hereinafter referred to as the city). This contention is based upon an agreement made between the city and the company in 1881 under which the company undertook to build 100 miles of railway southwest from the city, a passenger station and stockyards in the city and to execute and

deliver to the city a bond and covenant under its corporate seal to the effect that the company would

build within the limits of the city of Winnipeg, their principal workshops for the mainline of the Canadian Pacific Railway within the province of Manitoba, and the branches thereof radiating from Winnipeg, within the limits of the said province, and for ever continue the same within the said city of Winnipeg.

The city, on its part, undertook to issue debentures in the sum of $200,000 at 6 per cent, payable to the company on September 20, 1901, and to convey to the company the land upon which the station was constructed. This agreement also included the following provision:

8. Upon the fulfilment by the said company of the conditions and stipulations hereinmentioned, by the said Canadian Pacific Railway Company all property now owned, or that hereafter may be owned by them within the limits of the city of Winnipeg, for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind.

This agreement is set out in by-law 148 as passed by the city on September 5, 1881, and amended by by-law 195 passed by the city on October 30, 1882. Apart from extending the time for completing the 100 miles of railway and the passenger depot and cancelling the first two interest coupons on the debentures, by-law 195 effected no other changes. The province of Manitoba in 1883, by statute (46-47 Vict., S. of M. 1883, c. 64), declared that the by-laws (148 and 195) were "legal, binding and valid upon the said the mayor and council of the city of Winnipeg . . ." It is conceded that the company has not made default under this agreement, that the city conveyed the land and delivered the debentures and, apart from an unsuccessful attempt, *The Canadian Pacific Railway Company* v. *The City of Winnipeg* (1), to levy school taxes for the years 1890-94, no further or other taxes have been levied in respect of this property by the city until 1948, from which the company in this litigation claims exemption.

The four main questions raised, and all decided by the learned trial judge in favour of the company, are as follows:

(*a*) Is the agreement between the city and the company, contained in by-laws 148 and 195, valid and binding?

(*b*) If valid and binding, is the exemption operative only within the limits of the city of Winnipeg as these existed at the time the agreement was made or as these limits have been from time to time constituted?

(1) (1900) 30 Can. S.C.R. 558.

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(c) If the agreement is valid and binding, is the exemption therein provided for applicable to the Royal Alexandra Hotel and restaurant of the company within the city of Winnipeg?

(d) If the agreement is valid and binding, does the exemption therein provided for include the business tax?

In the Appellate Court the decision of the learned trial judge on question (*a*) was affirmed, but a majority of that court reversed the learned trial judge upon questions (*b*), (*c*) and (*d*).

The city contends that while the Canadian Pacific Railway Company was incorporated by letters patent under the Great Seal of Canada dated February 16, 1881, it is not a common law corporation endowed with the powers of an individual, but is, in effect, a statutory corporation and, therefore, can exercise only those powers expressly provided in, or necessarily implied from the terms of incorporation and that these terms do not expressly, or by necessary implication, give to the company the powers to bind itself forever, as it purported to do by the agreement of September 5, 1881.

The original agreement for the construction and operation of the Canadian Pacific Railway executed between a group therein styled "the company" and the government of Canada, under date of October 21, 1880, contemplated an Act of incorporation as evidenced by para. 21 thereof:

21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of an Act of incorporation being granted to the company in the form hereto appended as Schedule A.

Before the statute (44 Vict., S. of C. 1881, c. 1) approving and ratifying this contract was enacted it was evidently deemed desirable to provide for an alternative method of incorporation and accordingly sec. 2 of that statute provided:

2. For the purpose of incorporating the persons mentioned in the said contract, and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the *Canada Gazette*, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of incorporation within the meaning of the said contract.

The language of this s. 2 is consistent with the view that Parliament intended the letters patent should be issued by the Governor General in the exercise of the prerogative right. At the outset it is provided that

> For the purpose of incorporating . . . and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof . . .

This wide and comprehensive language is not limited or restricted by the provision

> a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract . . .

The position is similar to that in the *Bonanza Creek* case (1), where, though granted in accord with the statute, the letters patent were granted by the Lieutenant Governor of Ontario in the exercise of the prerogative right. The company, therefore, was endowed with the powers and capacities of a natural person, subject to any limitations or restrictions imposed by the statute.

Moreover, while this alternative method is provided in the same statute (S. of C. 1882, c. 1) in which statutory effect is given to sec. 21 of the contract, under which it was contemplated incorporation would be by statute, it was, as already pointed out, arranged for at a date subsequent to the contract. In these circumstances the intent and purpose of Parliament in making this alternative provision would be to provide something different in effect from that of incorporation by statute, and in the absence, as here, of any specific explanation, that intent and purpose would appear to be that if letters patent were issued the Governor General would do so in the exercise of the prerogative right and thereby give to the company the powers and capacities of a natural person, possessed only by corporations created in that manner, subject to such limitations or restrictions as the statute imposed.

The position is somewhat analogous to that in *Elve* v. *Boyton* (2), where it was contended that a company incorporated by letters patent pursuant to a statute (6 Geo. I, 1719, c. 19) was not incorporated by an Act of Parliament. Lindley, L.J., with whom Lopes, L.J., agreed, stated at p. 508:

> The answer is, it would have been impossible, without the Act of Parliament, to create such a corporation by that charter or any other

(1) [1916] 1 A.C. 566. (2) (1891) 1 Ch. 501.

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charter. The real truth is, that, if you look at it very closely, the corporation owed its birth and creation to the joint effect of the charter and of the Act of Parliament, and you can no more neglect the Act of Parliament than you can neglect the charter.

The language of Lindley L.J., is particularly apt as, apart from s. 2 above quoted, the company could not have been, in 1881, incorporated by letters patent. Parliament had, in 1877, expressly prohibited that possibility by providing that the incorporation of companies for the "construction and operation of railways" could not be effected by "Letters Patent under the Great Seal" (40 Vict., S. of C. 1877, c. 43, s. 3). When, therefore, it was decided that the alternative method of incorporation by letters patent should be made available, it was necessary that such be provided for by an express statutory provision, as indeed it was in s. 2.

This statute (44 Vict., S. of C. 1881, c. 1) was assented to on February 15, 1881, and on the following day letters patent were issued under the Great Seal of Canada incorporating the company. These letters patent recited the contract of the 21st of October, 1880, and the foregoing s. 2 and that "the said persons have prayed for a charter for the purpose aforesaid" and then provided:

> Now know ye, that, by and with the advice of our Privy Council for Canada, and under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in us vested in this behalf, We Do, by these our Letters Patent, grant, order, declare and provide * * * are hereby constituted a body corporate and politic, by the name of the "Canadian Pacific Railway Company."

The reference to statutory authority in the foregoing paragraph immediately followed by the words "and of any other power and authority whatsoever in us vested in this behalf," with great respect to those who entertain a contrary view, leads rather to the conclusion that the Governor General, in issuing the letters patent, acted not only pursuant to the statutory but to another authority separate and apart therefrom which, in the circumstances, could be only the prerogative right.. 6 Halsbury, 2nd Ed., p. 459, s. 547. The words "in this behalf," again with great respect, do not, in this context, refer to the contract but rather the power and authority to issue letters patent for the incorporation of companies.

In the *Bonanza Creek* case *supra* the letters patent, apart from the inclusion of the word "Statute" instead of "Act," included the following identical words that appear in the foregoing:

> under the authority of the hereinbefore in part recited Act, and of any other power and authority whatsoever in Us vested in this behalf.

The phrase "in part recited Statute," in the Bonanza Creek letters patent, refers to the Companies Act of Ontario (R.S.O. 1897, c. 191), s. 9 of which reads, in part, as follows:

> The Lieutenant-Governor in Council may, by letters patent, grant a charter * * * creating and constituting * * * a body corporate and politic for any of the purposes or objects to which the legislative authority of the Legislature of Ontario extends, except the construction and working of railways, * * * *

Viscount Haldane points out that s. 9 of the Ontario Act corresponds to s. 5 of the Dominion Companies Act (R.S.C. 1906, c. 79), the predecessor of which is s. 3 of the Companies Act of 1877 (40 Vict., S. of C. 1877, c. 43). While letters patent were not granted to the company under any of the foregoing general statutory provisions, they would, no doubt, be present to the minds of the parties when determining the method of incorporation.

The contract, statute and charter must all be construed in relation to the circumstances that obtained in 1880 and 1881. The construction, maintenance and operation of the railway was then an undertaking of the greatest magnitude. Parliament, particularly because of its obligations to British Columbia under the terms and conditions of the latter's admission into Confederation, desired not only that the railway should be constructed, but that its maintenance and operation should be efficient. It had provided that two parts of the railway should be constructed by the government of Canada and, when completed, handed over to the company. It was in these circumstances that Parliament enacted the provisions in s. 2 that, as an alternative to the incorporation by the Act of Parliament, letters patent might be issued. The language then adopted, particularly when construed in relation to the letters patent, as well as the circumstances of 1880 and 1881, discloses an intention that these were issued in the exercise of the prerogative right and thereby ensure to the company the benefits and advantages of that method of incorporation, subject only to the provisions of the statute.

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Even if, however, the letters patent incorporating the company were not issued by the Governor General in the exercise of his prerogative right, but rather in the exercise of a power delegated to him by the statute, and, therefore, the company must be treated as if it had been incorporated by statute, it would seem that the power to execute the contract here in question would be necessarily incidental to those powers expressed in the charter. That it was present to the minds of the parties that the company would be called upon to pay taxes is evident from the fact that they had provided for certain property of the company to be forever exempt in the contract with the government (cl. 16). In the same contract (cl. 7) the company agreed to "forever efficiently maintain, work and run the Canadian Pacific Railway." Under these circumstances the power to make agreements binding forever with respect to payment of and exemption from taxes would be included, or at least necessarily incidental to the powers conferred upon the company by the words "granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof," (S. 2 *supra*). This provision is in accord with cl. 21 of the contract, where it was provided:

> The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, * * *

and all this is implemented in the letters patent where it is provided that the company shall possess

> All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract * * * *

It is not suggested that at the time the contract with the city was made, or at any time thereafter, it has not proved useful to the company.

The concluding words of s. 2 above quoted make it clear that, while the charter is not an Act of Parliament, it shall have the force and effect thereof and shall be held to be in compliance with the provisions of the contract relative to incorporation. This provision was necessary by virtue of the terms of cl. 21 of the contract and it would appear that that was the only reason for its insertion.

In either view, the company, in executing the contract, did not exceed its powers as provided in its charter. This distinguishes this case from that of the *Whitby* v. *The Grand Trunk Railway Co.* (1), where the contract to erect and maintain the chief workshops of the company at Whitby was held to be beyond the powers given to the company incorporated in Ontario by 31 Vict., c. 42.

The company's covenant to "for ever continue" its principal workshops for the main line in Manitoba and the branch lines radiating out of the city and within the province does not offend against the principle that a company incorporated and entrusted with powers and duties by the legislature "cannot enter into any contract or take any action incompatible with the due exercise of its powers or the discharge of its duties." 8 Halsbury, 2nd Ed., 74, para. 126.

The contention of the city is that this covenant is incompatible with the company's obligation to "forever efficiently maintain, work and run the Canadian Pacific Railway." The foregoing principle was applied in *Montreal Park and Island Railway Company* v. *Chateauguay and Northern Ry. Co.* (2), where Davies J. (later C.J.C.), with whom Girouard J. agreed, stated at p. 57:

* * * the courts ought not to enforce and will not enforce an agreement by which a chartered company undertakes to bind itself not to use or carry out its chartered powers. I do not think such an agreement ought to be enforced because it is against public policy.

The learned judge went on to explain that if the company can covenant not to exercise its powers in part it may do so in whole and that

The courts have no right to speculate whether Parliament would or would not have granted these chartered powers to the defendant company over the limited area. Parliament alone can enact the limitation, and neither courts of justice nor companies can substitute themselves for Parliament.

See also *Winch* v. *Birkenhead, Lancashire and Cheshire Junction Ry. Co.* (3); *Ayr Harbour Trustees* v. *Oswald* (4); *Town of Eastview* v. *Roman Catholic Episcopal Corp. of Ottawa* (5); *Re Heywood's Conveyance* (6).

(1) (1901) 1 O.L.R. 480.
(2) (1904) 35 Can. S.C.R. 48.
(3) (1852) 5 De G. & Sm. 562; 64 E.R. 1243.
(4) (1883) 8 App. Cas. 623.
(5) (1918) 47 D.L.R. 47.
(6) [1938] 2 All. E.R. 230.

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The company's powers do not require the construction of its said principal workshops in any particular place in the province of Manitoba. They might, therefore, have been placed by the company at any point that it might have selected. What is significant is that its placing of them in the city has never been regarded as inconsistent or incompatible with its duty to forever maintain and operate the railway efficiently. In other words, the complaint is not that the company has failed or contracted not to exercise its power, but only that it has contracted not to exercise that power elsewhere in the province of Manitoba than the city of Winnipeg. That city may always remain the proper place for the maintenance of these principal workshops. Therefore, the language of the contract does not disclose any inconsistency or incompatibility with the company's duty. The city, however, suggests that future events, such as war, floods or other emergency, amalgamation or development in transportation equipment or methods may require the company, in the discharge of its duty, to move these principal workshops elsewhere, which would then be prevented by virtue of the existence of this covenant to forever maintain them in Winnipeg.

This is not a case, therefore, such as the *Montreal Park and Island Railway Co. supra* where the company contracted not to construct its railway in an area where its powers authorized it to do so. It is equally distinguishable from *Ayr Harbour Trustees* v. *Oswald supra* where the trustees purported to bind themselves in respect to the use of land and thereby to impose restrictions upon their use thereof, contrary to the purpose as contemplated under the statute under which they had acquired same. In both of these cases the language of the covenant was incompatible with the due exercise of the company's power. On the same basis the other cases above mentioned are also distinguishable.

Moreover, where, as already pointed out, the language of the covenant is not, upon its face, inconsistent or incompatible with the due exercise of the powers and the performance of the duties of the company, then, as pointed out by Lindley L.J., in *Grand Junction Canal Co.* v. *Petty* (1), the presence of incompatibility must be established by

(1) (1888) 21 Q.B.D. 273.

evidence. This view was referred to by Lord Sumner in *Birkdale District Electric Supply Co.* v. *Corporation of Southport* (1), and where, as here, no evidence is adduced, the statements of Lord Sumner would appear relevant where, at p. 375, he states:

> In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been *ultra vires* hitherto?

These remarks are particularly applicable because the possible incompatibility here present is founded upon the future possibility that these workshops, as located, would prevent the efficient management of the Canadian Pacific Railway. In such circumstances a finding of incompatibility should be established by evidence and not founded upon speculations as to the future, particularly in respect of a company that has been carrying on for over seventy years in a manner that in no way constitutes a suggested inconsistency or incompatibility.

No case was cited, nor have we found one, which, in principle, would justify the decree here requested, where the incompatibility is neither apparent from the language used nor established by evidence, but is supported only upon the possibility of future events which, even if they should occur, might not require the removal of the workshops in order that the railway might be efficiently maintained and operated and, therefore, would not establish the suggested incompatibility.

Moreover, it should be noted that the covenant here in question is concerned only with the principal workshops and, therefore, what other workshops may be necessary may be constructed by the company at such points in Manitoba as it may deem necessary or desirable.

Counsel on behalf of the city contends that it had no power to pass by-laws 148 and 195. The city derives its corporate powers from the province of Manitoba and even if, at the time, the province had not vested the city with the necessary power to pass the by-laws, any deficiency in that regard was supplied when the province enacted 46-47 Vict., S. of M. 1883, c. 64, declaring these by-laws 148 and 195 to be "legal, binding and valid upon the said the

(1) [1926] A.C. 355.

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mayor and council of the city of Winnipeg * * * *" This language does not support the city's contention that the statute merely validated the power of the city to enter into the agreement with the company and did not validate the agreement itself. The view that it did validate the agreement is not only supported by the foregoing language, but is strengthened by the language of the recital of the statute which reads, in part:

> And whereas, it is deemed expedient to set at rest all doubts that may exist as to the validity of any or all the above in part recited by-laws and the debentures issued thereunder, and to legalize and confirm the same, and each of them respectively.

The city of Winnipeg possessed the authority to enact by-laws, but it was the terms or the substance of by-laws 148 and 195 that gave rise to the questions as to their validity and the legislature resolved these questions by the foregoing enactment. In *Ontario Power Co. of Niagara Falls* v. *Municipal Corporation of Stamford* (1), where similar questions were raised, the legislature of Ontario "legalized, confirmed, and declared to be legal, valid and binding * * *" the by-law. Then once the terms of the by-law were validated there remained only the question of the construction of the terms thereof.

It was also submitted that the agreement was negotiated under the mistaken belief that it would assure the passage of the main line of the railway through the city of Winnipeg. By-laws 148 and 195 do not contain any undertaking on the part of the company to construct the main line through that city. On the contrary, throughout these by-laws it is rather assumed, as indeed the fact was, that the main line had already been altered to run through that city. In the recital Winnipeg is declared to be "a central point on the main line" and in the operative part the company undertakes to "establish and build within the limits of the city of Winnipeg, their principal workshops for the main line * * * *". It, therefore, appears that the parties were contracting upon the basis that the main line had already been altered to run through the city of Winnipeg and, therefore, there was no misunderstanding or mistake as to the facts in relation to which they were contracting, nor was there any failure of consideration.

(1) [1916] A.C. 529.

The city contends that the company's obligation to build their principal workshops "within the limits of the city of Winnipeg" should be construed to mean the limits as constituted on September 5, 1881, the date of the passage of by-law 148. It is important to observe that this phrase is not contained in an enactment of a law providing merely for an exemption from taxation, but is rather a law embodying the terms of an agreement in which the city, in consideration of undertakings to be, and, in fact, later executed by the company, obligated itself to exempt the company from taxation as therein provided. In these circumstances it should be construed, as stated by Lord Sumner, as "one of bargain and of mutual advantage," rather than as a statute providing for an exemption from taxation. *City of Halifax* v. *Nova Scotia Car Works Ltd.* (1). When the contract, as set out in by-law 148, is read as a whole, the conclusion is inevitable that the parties were looking to the future. The railway was not entirely constructed. The route of its main line had been altered to pass through Winnipeg. It would, when in operation, open up a vast new territory and Winnipeg was anxious to become an important commercial and railway centre. With this end in view, it agreed to help the company if the latter would construct certain facilities within its boundaries. The first recital states that 100 miles of railway southwest out of Winnipeg

should be built for the purpose of developing and advancing the traffic and trade between the city of Winnipeg and * * * *

The second recital emphasizes the establishment and continuation of the principal workshops and the stock yards. Then in the operative part, particularly in para. 4, the company undertakes to

erect * * * large and commodious stock or cattle yards, suitable and appropriate for the central business of their main line of railway and the several branches thereof.

At the time this covenant was given there was at Winnipeg neither main line nor branch lines and, of course, no railway business, and, while it is not necessary to determine the precise extent of this undertaking, it is obvious that it was looking to future circumstances. There is found, therefore, both in the recital and the operative parts, language

(1) [1914] A.C. 992.

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that supports the view that the parties were, in this contract, looking to the future development of both the railway and the city. In so far as the contract provided for the debentures of $200,000 and the payment therefor, it could only deal with the limits as then constituted.

It is significant that between the passage of by-laws 148 and 195 the area of the city of Winnipeg was more than doubled. By-law 148 was passed on September 5, 1881. The legislation providing for the enlargement of the city boundaries was assented to on May 30, 1882. About five months thereafter, on October 30, 1882, by-law 195 was passed amending by-law 148. Therefore, the amendment to by-law 148 contained in by-law 195 was passed at a time when the extension of the boundaries would be present to the minds of the mayor and the council of the city. If, therefore, the parties had intended in their contract, as evidenced by by-law 148, that the words "within the limits of the city of Winnipeg" meant the limits as they then existed, and those limits only, the possibility of misunderstanding and the desirability of clarification would have been equally present to their minds when amending by-law 148 by the passing of by-law 195. In these circumstances, had it been intended that the contract should forever apply only to the limits as fixed at the date of the contract, apt words would have been included in by-law 195 to give expression to that intention.

It is contended that, because by-law 148 specified that it should take effect as of the 21st day of September, 1881, and this date was carried forward in by-law 195, that the parties intended the words "within the limits of the city of Winnipeg" to mean the limits as constituted at the date of the contract. It is important to observe that the statute (37 Vict., S. of M. 1873, c. 7) incorporating the city of Winnipeg, as amended in 1875 (38 Vict., S. of M. 1875, c. 50, s. 93, subsec. 1), provided that a by-law such as 148 would not be valid unless it set out a day when the by-law should take effect. In accordance with that provision, by-law 148 set out that it should take effect on the 21st day of September, 1881. It had a particular significance in this case because the debentures were to be granted by way of bonus payable in twenty years from the day this by-law was to take effect with interest at 6 per cent per annum. Any

amendment, therefore, changing this date would affect the provisions for the issue of the debentures which were left, apart from that with respect to the first two coupons, entirely unchanged by the by-law 195. In these circumstances the fact that this provision was carried forward in identical language in by-law 195 does not support a conclusion that the parties intended thereby that the exemption should apply only to the boundaries of the city of Winnipeg as constituted on the date of the contract.

The workshops, as originally constructed, were within the limits of the city of Winnipeg as it existed at the time of the execution of the contract, and there remained, until 1903, when they were moved and reconstructed upon a location within the area added to the city in 1882. The city now, so far as the record discloses, for the first time contends that this removal of the workshops constituted a breach of the conditions of the contract and of the bond and covenant given as provided. This removal was openly made in a manner that could not but have been known to the officials of the city of Winnipeg. They did not then nor at any time have they made any objection thereto and have never sought to impose taxes thereon.

The subsequent conduct of the parties may be looked at, not to add to or vary the contract, but to assist in determining the intent and meaning of the parties. The record discloses that throughout the period from 1881 to date the city of Winnipeg has not, at any time, suggested that the phrase "within the limits of the city of Winnipeg" meant the limits as constituted at the date of the contract, but, on the contrary, the terms of the contract itself and the subsequent conduct of the parties indicate that such was never intended. *City of Calgary* v. *The Canadian Western Natural Gas Co.* (1).

It is suggested that in using the words "within the limits of the city of Winnipeg" the parties intended to designate the boundaries as then constituted, particularly as in other parts of the by-law the phrase used is "in the city of Winnipeg." It will be observed that in the second recital it is stated that the company have agreed to establish and continue their principal workshops and stock yards for the province of Manitoba "in the city of Winnipeg"; that with

(1) (1917) 56 Can. S.C.R. 117.

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respect to the stock or cattle yards the company undertook to erect them "within the city of Winnipeg." When they come to the exempting paragraph (cl. 8) they again use the words "on property now owned or that hereafter may be owned by them within the limits of the city of Winnipeg." It does not appear to me, in these circumstances, that the parties had in mind any particular distinction between the words "within the city of Winnipeg" and "within the limits of the city of Winnipeg."

When the contract is read as a whole and regard is had to the purpose and object thereof, as well as the circumstances surrounding the parties as they negotiated and executed it, and the subsequent conduct of the parties, particularly that of the city, one is led to the conclusion that the parties were contracting in respect of Winnipeg as an entity, regardless of its boundaries at any particular time, and, therefore, the exemption is applicable to areas that have been subsequently included within the boundaries of the city.

The company was authorized to own and operate hotels in 1902 (2 Edw. VII, S. of C. 1902, c. 52). Under this authority it constructed, in 1906, the Royal Alexandra Hotel, and it is now contended by the city that the Royal Alexandra Hotel and the restaurant therein are not included within the scope of the exemption set out in para. 8 of by-law 148, wherein it is provided, in part, that

> all property now owned, or that hereafter may be owned * * * within the limits of the city of Winnipeg, for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind.

The evidence in this case establishes that the hotel is adjoining the railway station and physically attached thereto; that "the railway uses the hotel services extensively"; that through the medium of its restaurant, dining room and other hotel facilities it provides food and lodging to passengers and employees of the company. It is conceded that these services are available to and utilized by the general public; the laundry in the hotel provides services to the sleeping and dining car department of the railway; that in the hotel "railway conferences and staff meetings are held"; that supplies for the hotel are provided or purchased for the hotel by the railway purchasing department.

The language of the exemption does not require that the property should be used exclusively "for railway purposes or in connection therewith" and, having regard to the evidence adduced in this case, it cannot but be concluded that even if the Royal Alexandra Hotel and restaurant are not used for railway purposes they are used "in connection therewith" and, therefore, within the terms of the exemption.

This case must be determined upon the language adopted by the parties, which raises issues quite distinct from that of determining whether the Empress Hotel was an integral part of the Canadian Pacific Railway system within the meaning of the British North America Act. *Canadian Pacific Ry. Co.* v. *The Attorney General of British Columbia* (1).

It is suggested that, because the Canadian Pacific Railway Company was not authorized to own and operate hotels until 1902, the exemption provided for in 1881 cannot be said to cover an enterprise which, at that date, would have been illegal. In the construction and operation of this hotel the company has acted within the authority granted to it by the statute of 1902. As already indicated, the company had, from the date of its incorporation, all the powers possessed at common law by a corporation created by charter. Even if this were not so, it is my opinion that, while the parties to the contract did not contemplate illegal acts, they did contemplate that as the enterprise developed significant changes would be made and, therefore, provided that not only the property "now owned" but also "that hereafter may be owned" by the company "shall be forever free and exempt." The fact that in 1902 the company was granted further statutory powers does not limit or restrict the meaning and effect of the words "that hereafter may be owned." The Royal Alexandra Hotel and the restaurant are, therefore, included within the language of the foregoing exemption.

In 1906, in 1914 and again in 1942 the parties to this litigation entered into agreements under which the Canadian Pacific Railway Co. paid certain amounts in lieu of taxation in respect of the hotel. These agreements disclose that there was a disagreement as to whether the property

(1) [1950] A.C. 122; 1 W.W.R. 220.

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was taxable and that in lieu of determining the issue the Canadian Pacific Railway Co. agreed to pay, and the city to accept, the specified amounts. Counsel for both parties ask that certain conclusions be drawn favourable to their respective contentions from the language used, but, having regard to the nature and character of the agreement and the language used, no conclusion ought to be drawn that would assist either party in determining their rights in these matters. These agreements were essentially made in lieu of the determination of those rights.

Then with respect to the validity of the business tax, prior to 1893 the city of Winnipeg was authorized to impose taxation upon real and personal property. In that year, by an amendment to the Assessment Act (56 Vict., c. 24), the city was no longer empowered to impose taxation upon personal property but was authorized to impose a business tax and it was expressly provided that this tax was "levied in lieu of a tax upon personal property." This has since been continued and is now found in the charter of the city of Winnipeg (S. of M. 1940, c. 81, as amended in 1948 by S. of M., c. 92) as sec. 291(1):

> 291. (1) * * * every person carrying on any business in the city whether he resides therein or not shall be assessed for a sum equal to the annual rental value of the premises * * *

and s. 9 provides:

> 9. Nothing in this Act shall
>
> (a) injure, affect, prejudice, or cause the forfeiture or impairment of, the benefit, right, exemption, or privilege, if any, of the Canadian Pacific Railway Company under
>
> (i) by-laws numbered respectively 148 and 195 or any other by-law of the city of Winnipeg; * * *

Apart from this statutory recognition of the exemptions created by by-laws 148 and 195 with respect to the business tax, the language of this exemption which we are here considering—"all property now owned, or that hereafter may be owned * * * shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind."—is even more broad and comprehensive than that in cl. 16 considered in *Canadian Pacific Ry. Co.* v. *Attorney General for Saskatchewan* (1), where this court held that the business tax was included within the exemption there provided for. The principle of that decision resolves this issue in favour of the company.

(1) [1951] S.C.R. 190.

The appeal should be allowed. The costs at trial should remain as directed by the Chief Justice of the Court of King's Bench for Manitoba. The appellant Canadian Pacific Railway Co. should have its costs in the Court of Appeal. In this court the two appeals, by order of Mr. Justice Kerwin, were consolidated and proceeded with as one appeal. The appellant Canadian Pacific Railway Company should have its costs in this court.

LOCKE J.:—By the agreement which provided for the construction of the Canadian Pacific Railway made between Her Majesty, acting in respect of the Dominion of Canada, and George Stephen and others, referred to therein as the company, dated October 21, 1880, it was provided *inter alia* that the portions of the proposed line which were to be built by the latter should be completed and in running order on or before May 1, 1891, and after providing that the portions to be constructed by the government of Canada should be duly completed and then conveyed to the company, the latter agreed to "thereafter and forever efficiently maintain, work and run the Canadian Pacific Railway". In addition to the land grant and subsidy in money provided by the contract, it was agreed that there should be granted to the company the lands required for its road-bed, stations, station grounds, buildings, yards and other appurtenances required for the convenient and effectual construction and working of the railway, in so far as such land should be vested in the government, and that, in addition, there should be admitted free of duty all steel rails and a number of other enumerated articles required for the construction of the road free of duty. By a further term, it was stipulated that the company should have the right, subject to the approval of the Governor in Council to lay out and locate the line of the railway.

The first reference to the incorporation of a company appears in paragraph 17 of this contract which commences:

> The company shall be authorized by their Act of incorporation to issue bonds, etc. * * * *

and this is followed by the language which has given rise to so much discussion in the present matter, incorporated in sections 21 and 22 which reads:

> 21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be

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binding in the event of an Act of incorporation being granted to the company in the form hereto appended as Schedule A.

22. The Railway Act of 1879, in so far as the provisions of the same are applicable to the undertaking referred to in this contract, and in so far as they are not inconsistent herewith or inconsistent with or contrary to the provisions of the Act of Incorporation to be granted to the company, shall apply to the Canadian Pacific Railway.

Schedule A to the contract bears the heading "Incorporation" and is expressed in the language in common use for the incorporation of companies by private Acts. Section 4 of this document reads:

All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and powers so hereby conferred upon them.

By chapter I of the Statutes of Canada, 1881, assented to on February 15th of that year, the contract was approved and ratified by Parliament and the government authorized to perform and carry out its conditions. While s. 21 of the contract made it clear that what was contemplated was that the company to be formed should be created by an Act of Parliament, the statute contained as s. 2 the following provision:

For the purpose of incorporating the persons mentioned in the said contract and those who shall be associated with them in the undertaking and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Governor may grant to them in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter, being published in the *Canada Gazette*, with any Order or Orders in Council relating to it, shall have force and effect as if it were an Act of the Parliament of Canada, and shall be held to be an Act of Incorporation within the meaning of the said contract.

What was meant by the word "charter" in this section was immediately made clear. On February 16, 1881, letters patent of incorporation under the Great Seal of Canada were issued incorporating the Canadian Pacific Railway Co. There is apparently no explanation as to why this procedure for the incorporation of the company was followed rather than that contemplated by the contract. While s. 4 of the schedule referred to above indicated that the proposed

company was to have the widest powers to enable it to carry out its undertaking and to take advantage of the various privileges and advantages which it was to receive from the Crown, it was perhaps considered advisable that it would be preferable to vest in the company the powers of a common law corporation restricted only in the matter defined by the contract and the schedule rather than to enumerate those powers which it was to be authorized to exercise. But this is mere speculation. If, therefore, assuming that the powers of the company are only those which it would have enjoyed had the incorporation been by a special Act of Parliament, the contract entered into by it with the city of Winnipeg was beyond its powers, it would be necessary to determine a second question, i.e., as to whether the railway company has all the powers of the natural person.

By its statement of claim, the railway company alleges that on or about September 5, 1881, an agreement was made between the company and the city granting to it the exemptions from taxation which are in issue in the present matter, the terms of which are stated to be set forth in certain by-laws of the city of Winnipeg. From the terms of the first of these by-laws, it is evident that there had been an agreement between the parties but, if it was reduced to writing, the document has not been produced. By-law No. 148 was adopted by the city on September 5, 1881, the date of the alleged agreement. After reciting that it was desirable that a line of railway should be built towards the westerly limit of the province of Manitoba through the Pembina Mountain district, for the purpose of developing traffic and trade between the city of Winnipeg and those portions of the province and:

> to secure the location of the work-shops and stockyards of the said company for the province of Manitoba in the city of Winnipeg as a central point on the main line of the Canadian Pacific and the several branches thereof, and the said company have agreed to construct a railway south and south-westerly, as aforesaid, at the time and in the manner as in this by-law hereinafter mentioned, and have agreed to establish and continue their "principal workshops and stockyards for the province of Manitoba in the city of Winnipeg aforesaid."

the by-law authorized the council to issue debentures in the total sum of two hundred thousand dollars charged on the whole rateable property in the city of Winnipeg

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and to deliver them to the railway company on the performance by it of certain defined conditions. Of primary importance is condition 3, which provided as follows:

> The said Canadian Pacific Railway Company shall immediately after the ratification of this by-law as aforesaid, make, execute and deliver to the mayor and council of the city of Winnipeg a bond and covenant under their corporate seal that the said company shall with all convenient and reasonable despatch, establish and build within the limits of the city of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within the province of Manitoba, and the branches thereof radiating from Winnipeg within the limits of the said province, and forever continue the same within the said city of Winnipeg.

In addition to providing for the delivery of the debentures, the by-law declared that:

> Upon the fulfilment by the said company of the conditions and stipulations herein mentioned by the said Canadian Pacific Railway Company, all property now owned or that hereafter may be owned by them within the limits of the city of Winnipeg, for railway purposes or in connection therewith, shall be forever free and exempt from all municipal taxes, rates and levies and assessments of every nature and kind.

By a by-law No. 195, adopted by the city on October 30, 1882, by-law No. 148 was amended and re-enacted and by c. 64 of the Statutes of Manitoba for 1883 assented to. On July 7 of that year the Act of Incorporation of the city was amended upon the petition of the mayor and council by declaring *inter alia* that these two by-laws were "legal, binding and valid upon the said the mayor and council of the city of Winnipeg". The learned trial judge has found as a fact that the railway company performed its various obligations referred to in the by-law in accordance with the terms of the agreement referred to: and that the city, on its part, discharged the obligations which it had assumed.

The first question to be determined is raised by the plea in the statement of defence of the city of Winnipeg that the railway company:

> had no right, power or authority under its charter or otherwise, to make, or execute, or deliver such a bond and covenant,

Referring to the bond and covenant required to be given by the company under condition 3 above referred to, and by a further plea that the railway company was without power under its charter or otherwise, to agree to build within the city of Winnipeg, or at any other place, its principal workshops for the main line of its railway within the province of Manitoba and to continue them forever.

For the railway company, it is contended that the incorporation being by letters patent, under the Great Seal of Canada, it has all the powers of a natural person and that the doctrine of *ultra vires* does not apply to it and reliance is placed upon the judgment of the judicial committee in *Bonanza Creek Gold Mining Co.* v. *The King* (1). For the city, it is said that the powers of the city are those only which it would possess if incorporated by an Act of Parliament and that the principle stated in *Ashbury Ry. Carriage and Iron Co.* v. *Riche* (2), applies.

The learned chief justice of the Court of King's Bench was of the opinion that the railway company had all of the powers of a common law corporation and in the Court of Appeal the Chief Justice of Manitoba and Coyne and Adamson JJ.A. agreed. The late Mr. Justice Richards considered that the company's powers were limited to those set forth in the Act authorizing its charter but that to enter into the agreement was within its powers. Dysart J.A. concluded that although the charter was in the form of a Royal Charter it was in substance a statutory one and the agreement *ultra vires* the company.

In the view I take of this matter, it is unnecessary to decide whether or not the Canadian Pacific Railway Company is vested with the powers of a common law corporation. I think that, if it be assumed for the purpose of argument that the powers of the company are simply those it would possess if the incorporation had been by statute and the terms of the letters patent contained in that statute, to enter into the bond and covenant was within those powers.

By the contract of October 21, 1880, which was approved and ratified by c. 1 of the statutes of 1881, the contractors assumed the vast obligation of building the major portion of the proposed railway through a country largely unsettled and following a route only generally defined and thereafter together with those portions of the proposed road to be constructed by the government, to:

thereafter and forever efficiently maintain, work and run.

the railway. While certain of the terminal points of the line then in part under construction were to be preserved, the company was to have the right, subject to the approval

(1) [1916] A.C. 566. (2) L.R. 7 H.L. 653.

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of the Governor in Council, to lay out and locate the proposed line and advantage was taken of this provision by abandoning the proposed route running generally westward from Selkirk and establishing the main line of the railway on a line which included the city of Winnipeg and changing the route through the mountains from the Yellow Head to the Kicking Horse Pass. By s. 21 of the contract, the company to be incorporated was to have "sufficient powers to enable them to carry out the foregoing contract" and it was apparently realized that wide powers must be given to the proposed company to enable it to advantageously carry out its terms. It was, in my opinion, for this reason that s. 4 of Schedule A to the contract was expressed in such wide language. It is clear that when the contract was signed, that the proposed incorporation was to be by an Act of Parliament which, I think, explains the very broad powers described in para. 4. It would have been quite unnecessary to particularize these powers in this manner had it been contemplated in 1880 that the incorporation should be by letters patent under the Great Seal, without any restriction upon the powers which such an incorporation would have vested in the company. Whatever the reasons which led to the grant of letters patent and whether or not it was intended by that Act to vest in the company the powers of a common law corporation, para 4 of schedule A was incorporated verbatim in the letters patent. Thus, there was conferred upon the company by s. 4 of the letters patent all the powers necessary or useful to enable it to discharge its obligations under the contract. It was, in my opinion, for the railway company to determine the location of its principal workshops for the main line of the Canadian Pacific Railway within Manitoba and the branches radiating from Winnipeg and that these workshops should be continued in such location as it should determine and to conclude as favourable a bargain as could be negotiated with the city or municipality where these were to be located. By the Fall of 1881 the directors of the company had evidently reached the conclusion that Winnipeg, by virtue of its location, was to be the principal city in the province of Manitoba and, thus, the most suitable place from which branch lines such as the line running south to Morris and westerly through the

Pembina Mountains areas, should have their eastern terminus. The company was not asked by the city in exchange for the promised tax exemption and the grant of the debentures to maintain its only railway workshops for the main line in Manitoba in Winnipeg, but merely the principal workshops: others might be constructed elsewhere in the province. The further obligation was to erect large and commodious stock and cattle yards suitable and appropriate for the central business of the main line and the several branches as mentioned in section 3 of the by-law, language which was incorporated in the covenant rather than that of paragraph 2 of the preamble to the by-law which referred to the "principal workshops and stockyards." The power of the company to agree to build a general passenger depot upon a designated site in the city is not, of course, questioned.

The comment of Lord Selborne L.C., on the decision of the House of Lords in *Ashbury Railway Co.* v. *Riche, supra,* in *Attorney General* v. *Great Eastern Railway Co.* (1), is that the doctrine of *ultra vires* as explained in the earlier case is to be maintained but that it should be reasonably understood and applied and that whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorized ought not, unless expressly prohibited, be held by judicial construction to be *ultra vires.* There is nothing in the letters patent or in the Act of 1881 which prohibited the railway company from entering into such a covenant as the one here in question. It was, in the language of s. 4, undoubtedly "useful" to the company to enable it to carry out its contract to construct the railway and thereafter to operate it in perpetuity to give such a covenant, in order to obtain such extensive financial assistance and exemption from municipal taxation. In my opinion, the contention that it was beyond the powers of the Canadian Pacific Railway Co. to enter into the bond and covenant, fails.

As a further defence to the action, the defendant pleads that it had no right, power or authority under its charter or otherwise, to pass by-laws Nos. 148 or 195. The original charter of incorporation of the defendant is contained in

(1) (1880) 5 App. Cas. 473 at 478.

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c. 7 of the statutes of 1873 and thereby the inhabitants of the city and their successors were declared to be:

> A body politic and corporate in fact and in law by the name of "The Mayor and Council of the city of Winnipeg" and separated from the county of Selkirk for all municipal purposes.

It was by this name that the corporation was described in the consolidated charter of the city in c. 36 of the statutes of 1882. The language of s. 6 of c. 64 of the statutes of 1883, in so far as it affects the present matter, reads:

> That * * * by-law No. 148 to authorize the issue of debentures granting by way of bonus to the Canadian Pacific Railway Company the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertakings expressed in by-law No. 148 by the Canadian Pacific Railway Company, and all debentures and coupons for interest issued under each and every of the said by-laws, be and the same are hereby declared legal, binding and valid upon the said mayor and council of the city of Winnipeg.

Without considering the question as to whether the corporation had the power to agree to the tax exemption and the granting of the bonus under its existing powers, it is clear that it was intended to validate the by-laws and declare that the obligations on the part of the city referred to in them were binding upon it. To otherwise construe the section would be, in my opinion, to defeat the intention of the legislature. S. 14 of the Interpretation Act (c. 105, R.S.M. 1940) declares that:

> Every Act and every regulation and every provision thereof shall be deemed remedial and shall receive such fair, large and liberal construction and interpretation as best insures the attainment of the object of the Act, regulation or provision.

The object of the amendment was to set at rest any doubts as to the power of the corporation to obligate itself in the manner described in the by-laws and the section must, in my opinion, be so construed.

The bond and covenant of the railway company, dated October 10, 1881, delivered in pursuance of the agreement recited in the city by-laws, after referring in a recital to the agreement of the city to grant aid to the company to the extent of $200,000 by the issue of debentures and by exempting the property of the company from certain taxation, obligated the company to:

> establish and build within the limits of the said city of Winnipeg their principal workshops for their main line of railway within the province

of Manitoba and for the branches thereof, radiating from the said city of Winnipeg within the limits of the said province and that they will forever continue the same within the said city of Winnipeg.

At the time this instrument was made, the area contained within the limits of the city of Winnipeg were those defined by c. 7 of the statutes of Manitoba for 1873 and an extension provided by c. 38 of the statutes of 1875, and it was within this area that the workshops erected in pursuance of the covenant were placed. Thereafter, on various occasions, the limits of the city were extended: large areas were added by c. 45 of the statutes of 1882 and these limits were further extended in the years 1902, 1906 and 1907. In the year 1903, the railway company removed the workshops from the original site to a point further west within the area added in 1882 where they have since been maintained. By an amendment to its statement of defence, the city alleges that the railway company is not entitled to the exemptions from taxation claimed, since it did not fulfill the conditions mentioned in by-law No. 148 in that about the year 1903, the company built their principal workshops or a substantial part thereof, outside the limits of the city of Winnipeg as defined and constituted in the year 1881. The recitals in the by-law declared *inter alia* that it was desirable to secure the location of the workshops and stockyards of the company for the province of Manitoba in the city of Winnipeg as a central point on the main line of the Canadian Pacific Railway and the several branches thereof and that the company had agreed to establish and continue its principal workshops and stockyards for the province in the city. "Desirable" meant desirable in the interest of the municipal entity known as the city of Winnipeg and of its inhabitants. The purpose of those negotiating on behalf of the municipal corporation was to ensure in its interest and in the interest of its present and future inhabitants that these activities of the railway company, with the manifest benefits which would result, should be continued for all time in Winnipeg. They did not seek the benefit merely for the then residents of the city living within its existing limits, but also for those who would thereafter live within the limits of the corporation from time to time and the corporation whatever might be its limits. They did not stipulate the place within the corporate limits where the workshops should be placed

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which was apparently not regarded as a matter of moment: they sought to ensure simply that they should be constructed and maintained and operated within the limits of the corporation as they might be from time to time. The purpose of the railway company which had obligated itself by its contract with the government to operate the railway line in perpetuity was to obtain, not only immediate financial help, but exemption from municipal taxes for all time.

In *River Wear Commissioners* v. *Adamson* (1), Lord Blackburn stating the principle to be applied in the construction of the language of instruments in writing, said in part:

> In all cases, the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

The question is what is the meaning of the words "within the said city of Winnipeg" as used in this covenant and it is permissible, in my opinion, to consider the language of the by-law in pursuance of which it was given as an aid to construction. Once the object of both parties is ascertained, it seems to me that the meaning is made perfectly clear. Without resorting to other aids to interpretation, it is my opinion that the obligation was to continue the workshops within the limits of the city of Winnipeg as they might be from time to time.

Assuming that there is doubt as to the meaning to be assigned to these words, the subsequent conduct of the parties may be examined to resolve the ambiguity and to do this in the present matter makes certain what both parties intended by the language employed. The workshops were built within the limits of the City of Winnipeg as defined by the city charter as it read in the year 1881, but in the following year, those limits were largely extended. The railway company owned properties within the new areas added to the city in 1882. Presumably, if effect is to be given to the argument of the city on this aspect of the matter, the expression "the city of Winnipeg" in s. 8 of by-law No. 148 which declared the right to the tax

(1) (1877) 2 A.C. 743 at 763.

exemption, should be construed in the same manner as those words in s. 3 and of the covenant given in pursuance of the terms of the latter section. However, it is admitted that none of these lands either in the original or in the added area were subjected to municipal taxation between the years 1882 and 1900 except that in 1894 the city sought to levy school taxes upon the railway company's property and brought an action to recover them, which failed. Between the years 1900 and 1947, the city was prohibited by the terms of the Railway Taxation Act (63 and 64 Vict. c. 57) from taxing the property of the company. Apart from any question as to the effect the judgment in this action may have upon the present proceedings by rendering issues here sought to be raised *res judicata,* it is of importance to note, as relating to the subsequent conduct of the parties, that in that action (*City of Winnipeg* v. *Canadian Pacific Railway Co.*) (1), which was decided upon a demurrer, the question litigated was as to whether school taxes were within the class of taxes for which exemption had been promised, and it was not then contended by the city that that exemption was in any event limited to lands owned by the railway company for railway purposes within the limits of the city of Winnipeg as they existed in 1881. It is perhaps further worthy of note that the claim that the railway company had lost its right to any tax exemption provided by the by-law by virtue of the fact that in 1903 it had established its principal workshops or a substantial part thereof outside the limits of the city of Winnipeg as defined and constituted in the year 1881 was first raised by an amendment to the statement of defence made some months after the original defence, some thirty-five paragraphs in length, had been filed. This suggests that this point had not occured to the city or any of its legal representatives until after the original statement of defence was filed.

In the view that I take of this matter it is unnecessary to deal with the question as to whether the power of the city to enter into the agreement is *res judicata* by reason of the litigation between the parties commenced in the year 1894 above referred to (12 M.R. 581; 30 S.C.R. 561).

The question as to whether business taxes are within the exemption provided for by the by-law is, in my opinion,

(1) 12 Man. L.R. 581; 30 Can. S.C.R. 558.

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concluded in favour of the appellant by our decision in *Canadian Pacific Ry.* v. *Attorney General of Saskatchewan* (1).

There remains the question as to whether the Royal Alexandra Hotel property falls within the exemption. The promised exemption was of all property then owned or which might thereafter be owned by the railway company within the limits of the city of Winnipeg:

"for railway purposes or in connection therewith".

The Royal Alexandra Hotel is built on railway property at the corner of Higgins avenue and Main street, in the city of Winnipeg, and is physically connected with the railway station. Part of the station building itself is used by the Royal Alexandra Hotel as a coffee shop which provides meals to the travelling public and railway employees. The hotel was originally constructed in 1906 and considerably enlarged in the year 1914. According to Mr. William Manson, vice-president of the prairie region of the railway company, the railway uses the hotel services of this hotel extensively. All linen from the sleeping and dining cars is laundered in the hotel laundries. Accommodation is furnished to extra sleeping and dining car conductors and dining car crews during periods of heavy traffic, meals are provided to these employees and some railway conferences and staff meetings are held there. In the same manner as the other hotels operated by the railway company in Toronto, Regina, Calgary and elsewhere, the Royal Alexandra Hotel provides food and lodging for the travelling public. Speaking generally of all the railway company's hotels, Mr. Manson said that they have been established for the traffic that they would draw to the railway and that it its considered essential to proper railway service to have an adequate hotel system. The Royal Alexandra, however, does not restrict its activities to those above described but is used by the general public, irrespective of whether they are making use of the railway's other facilities: balls and entertainments are held there and other public functions.

The question is simply one of construction of the language of the by-law. While the hotel is clearly not used exclusively for railway purposes or in connection therewith, to

(1) [1951] S.C.R. 190.

the extent that it furnishes lodging and meals to persons other than those travelling on the railway and its facilities are used for functions unrelated to any railway activity, I do not think this affects the matter to be decided. The railway company was, at the time the by-law was passed, empowered by s. 4 of its letters patent to carry on such activities as might be useful to it to enable it to carry out its obligations under the contract. The evidence of the witness Manson is not contradicted. The operation of railway hotels, where the station and the hotel are incorporated in one building, is commonplace in England and has been for a very long time. I think s. 4 of the charter empowered the railway company to maintain and operate hotels in connection with their railway activities if it was considered that this would assist the development of its railway properties and the discharge of its obligation to operate the Canadian Pacific Railway in perpetuity. The language of the by-law is not that the properties exempted were those then or which might thereafter be owned exclusively for railway purposes or in connection therewith, and I think the language should not be construed in a manner so restricting it.

It has been contended in argument that the decision of the judicial committee in *Canadian Pacific Ry.* v. *Attorney General for British Columbia* (1), affects the matter, but I think that this is not so. The issue in that litigation was as to whether the hours of work of the employees of the Empress Hotel in Victoria, owned and operated by the present appellant, were regulated by The Hours of Work Act of British Columbia. Three questions were considered on the appeal: the first of these was raised by the contention that the Empress Hotel being an integral part of the railway system of the company and its activities having become such an extensive and important element in the national economy of Canada, the regulation of its activities did not come within the class of matters of a local or private nature comprised in the enumeration of the classes or subjects assigned by s. 92 exclusively to the legislatures of the provinces, so that parliament was entitled under the general powers conferred by the first part of s. 91 to regulate its affairs; the second was as to whether the hotel was part

(1) [1950] A.C. 122.

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of the appellant's railway works and undertaking connecting the province of British Columbia with other provinces and thus within the exception contained in head 10(*a*) of s. 92; the third was as to whether the hotel, as part of the company's railway system, fell within head 10(*c*) of s. 92 as a work which had been declared by parliament to be for the general advantage of Canada or of two or more of its provinces. All of these questions were decided contray to the contentions of the railway company. None of them appear to me to bear upon the present matter which, as I have said, is simply one of the construction of the particular language of the by-law.

For these reasons, I think the Royal Alexandra Hotel property is entitled to the exemption provided for by the by-law and which is enjoyed by other properties of the company within the present limits of the city of Winnipeg owned for railway purposes or in connection therewith.

The appeal of the railway company should be allowed with costs and that of the respondent city dismissed with costs; the judgment of the Court of Appeal should be set aside and that of the learned trial judge restored. The appellant should have its costs in the Court of Appeal.

Appeal of the Canadian Pacific Railway Co. allowed, judgment of Court of Appeal set aside and that of trial judge restored with costs here and in the Court of Appeal. Appeal of the city of Winnipeg dismissed with costs.

Solicitor for Canadian Pacific Railway Co.: *H. A. V. Green.*

Solicitor for The City of Winnipeg: *G. F. D. Bond.*

LA CITÉ DE VERDUN (DEFENDANT).....APPELLANT; 1952

AND *Mar. 24
*Apr. 2

JOSEPH ÉDOUARD VIAU (PETITIONER)..RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Writ of prohibition arising out of criminal charge—Case started before 1949 amendment to Supreme Court Act—Cities and Towns Act, R.S.Q. 1941, c. 233, s. 302—Supreme Court Act, R.S.C. 1927, c. 35, s. 36.

The Supreme Court of Canada is without jurisdiction to hear an appeal in a case, which was started prior to the 1949 amendment to the *Supreme Court Act*, of a writ of prohibition arising out of a charge of aiding the commission of the offence of personation contrary to s. 302 of the *Cities and Towns Act* (R.S.Q. 1941, c. 233), notwithstanding the fact that special leave to appeal had been granted by the Court of Appeal, since this was a "proceeding for or upon a writ of prohibition arising out of a criminal charge", within the exception in s. 36 of the *Act*, as it stood before the 1949 amendment.

Boyer v. *The King* [1949] S.C.R. 89; *Marcotte* v. *The King* [1950] S.C.R. 352; *Rex* v. *Nat. Bell Liquors Ltd.* [1922] 2 A.C. 128 and *Canadian International Paper* v. *La Cour de Magistrat* [1938] S.C.R. 22 referred to.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), which reversed, St. Jacques and Barclay JJ.A. dissenting, the decision of the trial judge and maintained the writ of prohibition.

L. J. de la Durantaye Q.C. for the appellant.

Ubald Boisvert for the respondent.

The judgment of the Court was delivered by:

KERWIN J.:—The Court of King's Bench for the province of Quebec (Appeal Side) (1) granted leave to the city of Verdun to appeal to this Court from a judgment of its own maintaining a writ of prohibition at the suit of J. E. Viau. This Court's jurisdiction is defined by the *Supreme Court Act* and, as the request for a writ of prohibition was made in 1948, we must refer for our powers to that *Act* as it stood before the 1949 amendment: *Boyer* v. *The King* (2), where the earlier cases are considered. The decision in *Boyer* was approved by all the members of this Court: see *Marcotte* v. *The King* (3).

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Cartwright JJ.

(1) Q.R. [1951] K.B. 172. (2) [1949] S.C.R. 89.
(3) [1950] S.C.R. 352.

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CITY OF VERDUN v. VIAU

Kerwin J.

By section 36 of that *Act*, as it then stood, there is excepted from our jurisdiction any proceedings for or upon a writ of prohibition arising out of a criminal charge. The word "criminal" in the section and in the context in question is used in contradistinction to "civil" and connotes a proceeding which is not civil in its character: *Rex* v. *Nat Bell Liquors Ltd.* (1), affirming (1921) 62 S.C.R. 118. This was a case of certiorari arising out of a prosecution under the Alberta Liquor Act but *Mitchell* v. *Tracey* (2), a case of prohibition arising out of a prosecution under the Nova Scotia Temperance Act was approved. Here, the application for the writ of prohibition arose out of a charge against the respondent of aiding the commission, by another, of the offence of personation contrary to article 302 of the *Cities and Towns Act* R.S.Q. 1941, c. 233. This appeal, therefore, falls within the exception in section 36 of the *Supreme Court Act* and it must be quashed with costs as of a motion to quash. The respondent is also entitled to its costs of the application for leave to appeal to this Court made to the Court of King's Bench, which by the latter's order, were to follow the event.

The appellant served a notice of motion for special leave to appeal under new section 41 of the *Supreme Court Act* as enacted by the amending Act of 1949. For the reasons already given, the new section does not apply and that application must be dismissed with costs.

It should be added that the leave given by the Court of King's Bench does not avail the appellant as the right to grant leave, conferred on that Court by section 41 of the *Supreme Court Act*, is confined to "any case within section thirty-six i.e. except (*inter alia*) any proceedings for or upon a writ of prohibition arising out of a criminal charge: *Canadian International Paper* v. *La Cour de Magistrat* (3).

Appeal quashed with costs.

Solicitors for the appellant: *Fauteux, Blain & Fauteux.*

Solicitor for the respondent: *Ubald Boisvert.*

(1) [1922] 2 A.C. 128 at 168. (2) (1919) 58 Can. S.C.R. 640.
(3) [1938] S.C.R. 22.

JOE J. BONNIE (PLAINTIFF) .....APPELLANT; 1951 *Nov. 22, 23

AND

1952 *Feb. 5

AERO TOOL WORKS LTD. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Principal and agent—Principal to pay commission on purchases effected by agent on its behalf subject to terms of written agreement—Agent having fulfilled the terms, principal refused to complete purchase—Measure of Damages.

Under a written agreement the respondent undertook to pay the appellant a ten per cent commission on ignition transformers to be purchased by the appellant and laid down in Canada at a price not to exceed $15, and by a further document authorized the appellant to act as its representative in the purchase of transformers. The appellant, as representative of the respondent, entered into an agreement with an English firm for the purchase of 20,000 transformers at a price of £2.5.0d, ten per cent of the purchase price to be paid with the official order. The respondent ultimately refused to proceed with the purchase. In an action brought by the appellant for payment of commission.

Held: An agreement to purchase implies a covenant to pay the purchase price. *Grieve McClory Ltd.* v. *Dome Lumber Co.* [1923] 2 D.L.R. 154 at 164; *Inland Revenue Commissioners* v. *Gribble* [1913] 3 K.B. 212. Where as here, the express agreement to buy is followed only by "terms of payment" including a first payment of ten per cent with "official order" and no time is fixed, the law implies a reasonable time but not a condition that it will not be fulfilled except at the buyer's option, therefore the appellant brought about a binding contract of purchase and sale. Since the appellant did all he agreed to do, and the conduct of the respondent was the cause of there being no deliveries, the former was entitled to damages in the amount he would otherwise have been paid as commission. *Whyte* v. *National Paper Co.* 51 Can. S.C.R., followed, *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the judgment of Ferguson J. (2) dismissing the action.

R. A. McMurtry K.C. and *D. A. Keith* for the appellant. It must be conceded that the appellant earned his commission and is entitled to judgment if he completed a binding contract with the Runbaken Co. with respect to the sale and purchase of 20,000 transformers. It is submitted that the contract entered into by the appellant on Jan. 29, 1947 with the Runbaken Co. is a binding executory

*PRESENT: Kerwin, Kellock, Estey, Cartwright and Fauteux JJ.

(1) [1951] O.W.N. 315. (2) [1950] O.W.N. 427.

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contract between the respondent and the Runbaken Co. The trial judge erred in holding that the said contract was not effective or binding unless and until the respondent should sign a further document referred to as an "official order". He erred and misdirected himself on the evidence when he purported to make the said finding on the following grounds:

(*a*) That the only evidence of what was meant by "official order" was that given by Lome, the president of the respondent company.

(*b*) That such a finding was in accordance with the interpretation put on the contract by the appellant himself in his letter to the respondent (Exhibit 9) and subsequent correspondence and

(*c*) On the wording of the agreement itself.

The above grounds on which the trial judge based his findings are not valid for the following reasons:

1. As to (*a*)—Both the appellant and Lome gave evidence which was entirely inconsistent with the finding of the trial judge as to the meaning of the term "official order".

2. As to (*b*)—The appellant considered that he had effected a binding contract and this is borne out by the correspondence in the light of the evidence adduced.

3. As to (*c*)—The agreement itself is not fairly open to the interpretation adopted by the trial judge. The term "official order" as used in the contract was only referable to an administrative act on the part of the respondent company which it was bound to perform in order to fix the time for delivery under the contract and the instalments of payments. It is obvious that from the inception of this action down to a few days before the trial the defendant company itself considered that the plaintiff had effected a binding contract with the Runbaken Co. to the extent of entitling him to the payment of his commission. It is significant that the original Statement of Defence raised no real issue or suggestion that the plaintiff had not earned his commission but relied solely on a plea of accord and satisfaction. On the basis of the reasoning of the trial judge the interpretation placed on this contract by the

defendant in its original Statement of Defence may be of some importance in determining the state of mind of the parties, with respect to the contract and its true meaning. Even in its amended Statement of Defence the defendant continued to plead (and not expressed as an alternative plea) that the plaintiff and defendant agreed to a full settlement of the plaintiff's claim for commission upon payment by the defendant to the plaintiff of the further sum of $2,020. That the defendant paid the said sum and the same was accepted in full satisfaction of all claims against the defendant in respect of commissions. Although a great deal of evidence was tendered by the defendant in support of the above allegations, the trial judge rejected the evidence *in toto* on this point and accepted the plaintiff's version. The trial judge purports to hold that the contract was not a binding contract solely by reason of there being no "official order" signed by the defendant company. It is difficult to understand the validity of this reasoning in view of the fact, on the basis of the trial judge's express finding, that the plaintiff had full authority to bind the defendant company with respect to the purchase in question so that all the plaintiff had to do was to sign such an order himself, if he deemed it in any way necessary. It is well settled law that an agent is entitled to payment of his commission by his principal once he has fulfilled his obligation by effecting a binding agreement between his principal and a third party. This vested right of the agent to his commission can not be destroyed by reason of any act or default on the part of the principal or the third party. *Luxor (Eastbourne) Ltd.* v. *Cooper* (1) per Lord Russell at 41, 46; *Marshall* v. *Canada Corn Products* (2); *Whyte* v. *National Paper* (3); *Whiteside* v. *Wallace Shipyards* (4).

J. J. Robinette K.C. and *B. Grossberg K.C.* for the respondent. The claim of the plaintiff as set out in the Statement of Claim is for "commissions earned". There is no claim on *quantum meruit* or for damages nor could either of such claims be sustained in law. *Davis* v. *Trollope* (5).

(1) [1941] 1 All E.R. 33.
(2) (1925) 28 O.W.N. 320.
(3) (1915) 51 S.C.R. 162.
(4) (1919) 45 D.L.R. 434.
(5) [1943] 1 All E.R. 501.

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Under the terms of exhibit 1 (Letter from the respondent company to the appellant dated Nov. 28, 1946) the events which must happen before the plaintiff could recover commissions are (*a*) a purchase; the transformers must be laid down in Canada; the laid down price in Canada must not be in excess of $15; a purchase by the plaintiff himself. There never was a purchase. It is submitted purchase means a legally binding and completed contract of purchase and sale. Exhibit 3 (agreement between respondent and Runbaken Electrical Products signed by appellant) was simply an offer or proposal which required acceptance as therein set out, namely by an official order and a deposit. Before there could be a legal contract there was required an official order from the defendant and a deposit of £1,150 from the defendant.

No commission was payable because no transformers were laid down in Canada. This is admitted. Exhibit 3 indicates that the prices were to be reviewed every three months. One could not calculate the commissions until delivery was made. It cannot be said the price would never exceed $15. It is submitted that the words "purchased by yourself" means the plaintiff was to purchase on his own behalf and ship the transformers to Canada. The defendant could not enforce exhibit 3 against Runbaken nor could Runbaken enforce it against the defendant, nor was any effort made by Runbaken to maintain there was a contract of purchase and sale. The amount involved in Exhibit 3 was approximately $150,000 and it cannot be reasonably said that the plaintiff could bind the defendant for such an amount without the defendant having an opportunity to give its "official order". Runbaken must have realized this when it asked for an "official order" and a deposit.

There being no completed or legally binding contract of purchase and sale and no transformers having been "laid down" in Canada, the plaintiff cannot recover. *Luxor (Eastbourne) Ltd.* v. *Cooper* (1); *Jones* v. *Lowe* (2); *Murdoch* v. *Newman* (3); *Fowler* v. *Bratt* (4); *Dennis Reed Ltd.* v. *Goody* (5); *McCallum* v. *Hicks* (6); *Graham*

(1) [1941] A.C. 108; 1 All. E.R. 33.
(2) [1945] 1 All. E.R. 194.
(3) [1949] 2 All. E.R. 783.
(4) [1950] 1 All. E.R. 662.
(5) [1950] 1 All. E.R. 919 at 923.
(6) [1950] 1 All. E.R. 864.

& Scott (Southgate) Ltd. v. *Oxlade* (1); *Bennett, Walden & Co.* v. *Wood* (2); *Spottiswoode* v. *Doreen Appliances Ltd.* (3); *McLean* v. *Elliot* (4); *Chambers* v. *Smart* (5); *Gladstone* v. *Catena* (6). Dealing with the alternative defence that a settlement was made, the plaintiff contends that the Runbaken matter was not mentioned when he visited Lome in Toronto in July 1947. It is submitted that such contention is unreasonable and ought not to be accepted. The trial judge made no express finding that he disbelieved Lome or Brooker with respect to the settlement and having found that the words "payment in full re commissions" were on the cheque when it was received by the plaintiff and the plaintiff having signed underneath these words and cashed the cheque, the plaintiff is bound thereby. The evidence of Brooker corroborated that of Lome and the trial judge did not give proper effect to the endorsement on the cheque and should have held that the plaintiff was bound thereby.

McMURTRY K.C. replied. The judgment of the Court was delivered by:

KELLOCK J.:—The parties to this appeal entered into an agreement on the 28th of November, 1946, as follows:

> It is hereby agreed that you (the appellant) are to receive a 10 per cent commission on ignition transformers purchased by yourself and laid down in Canada at a price not in excess of $15 and a 10 per cent commission on motors purchased by yourself at a price laid down in Canada not in excess of $20.

At the same time, the respondent executed and gave to the appellant the following document:

> TORONTO 1, CANADA.
> November 28, 1951.
>
> To Whom It May Concern
> Greetings:
>
> This is to certify that Mr. J. J. Bonnie, whose signature appears hereon, is hereby authorized to act as our representative in the purchase of oil burner ignition transformers, motors and copper wire.

The appellant was proceeding to England where the purchases mentioned above were to be made. Following a telephone conversation on January 24, 1947, between the appellant, then in England, and one Lome, president of

(1) [1950] 1 All. E.R. 856.
(2) [1950] 2 All. E.R. 134.
(3) [1942] 2 All. E.R. 65.
(4) [1941] O.W.N. 124.
(5) [1948] O.R. 165.
(6) [1948] O.R. 182.

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the respondent, in Canada, the appellant, on behalf of the respondent, entered into an agreement in writing on the 29th of January, 1947, with an English firm, Runbaken Electrical Products, for the purchase of 20,000 transformers. The following terms of that agreement are of importance:

> Messrs. Aero Tool Works as represented by Mr. J. J. Bonnie, *agrees to purchase* 20,000 Transformers as herein specified.
>
> .....
>
> Owing to the unstable situation of materials and labour it is agreed that prices will be reviewed at the end of each 3 months period after delivery commences with a view to recosting up or down.
>
> *TERMS OF PAYMENT*
>
> Price £2.5.0d (TWO POUND, FIVE SHILLINGS) each nett. F.O.B. Manchester Dock. 10 per cent of the purchase price of 5,000 Transformers to be paid with official order that is £1,150. (ELEVEN HUNDRED AND FIFTY POUNDS). Balance against documents which are to be rendered to the Canadian Bank of Commerce, 2 Lombard Street, London, E.C. 3.
>
> *DELIVERY*
>
> To be 10 weeks from date of official order at the rate of 400 per month to be stepped up to 1,600 per month within 7 months from date of official order.

On the day following the telephone conversation already mentioned, the appellant had written to Lome advising him that the agreement with Runbaken would be forwarded to him the following Tuesday. The letter adds,

> I quoted the price to you, which is 9 dollars f.o.b. Manchester—this may on final analysis run to 9 dollars and 10 cents or somewhere in that vicinity, but no more.

The appellant sent Lome the executed agreement, by letter of January 30, calling his attention to various provisions, particularly referring to the term with respect to revision of price, and pointing out that work would not commence until the official order and the first payment of the price had been received.

On receipt of this letter, Lome cabled the appellant on February 5th that it would be necessary for the respondent to obtain a permit from the Foreign Exchange Control Board in order to send the £1,150, but that the money would be cabled that week. On the same day Lome wrote the appellant stating that he had been advised by the manager of the respondent's bank that the granting of this permit was "just a matter of routine."

By letter of the 10th of February, Lome advised the appellant that although a permit had been granted by the Board the previous week authorizing payment for the transformers within a period of six months, a new one had to be applied for as the transformers were to be delivered over a period of two years. The new permit had not yet come to hand. He explained the delay in receiving the permit as "apparently caused by some ruling beyond the capacity of ourselves and the bank", but asked the appellant in this letter if he would

> do everything possible to keep peace with Runbaken until this export for English funds is obtained, and just mark time until I arrive in England.

The appellant complied with these instructions and in a letter of the 25th of February, 1947, to Lome he stated that he was endeavouring to keep the English company "quiet over the question of their initial deposit," and that the latter was "playing ball with us to the extent of continuing their tooling up of the process and getting together the necessary materials for our transformers." This indicates that the appellant's statement in his letter of the 30th of January, that work would not commence until the official order had been received, meant only that actual manufacture of the transformers would not commence until that time. In the meantime, the English company was readying itself. The implication which the respondent sought to draw from the earlier statement, that the Runbaken company itself did not regard the agreement as a binding contract, is, I think, thus negatived.

For reasons of its own, the respondent never sent an order or made any payment, all the while maintaining to the appellant that difficulty was still being experienced in obtaining the permit. That such difficulty was imaginary and put forward for self-serving reasons appears from the evidence of the Toronto manager of the Control Board called by the appellant. He deposed that in February 1947, while a permit for the export of funds was necessary, the chartered banks had full authority as agents of the Board to grant permits for any amount in question under the Runbaken contract. The situation thus disclosed was left unexplained by the respondent, and the learned trial judge found that Lome was not "frank" in his dealing with the appellant.

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The evidence of the Board's manager indicates that the real fact was as Lome had himself stated in his letter of the 5th of February, 1947, that the matter of a permit was, as he had been advised by the respondent's bank manager, "just a matter of routine." Subsequent events had impelled him to change his mind with respect to the desirability of the Runbaken contract. The alleged difficulty as to a permit was merely a convenient excuse.

It appears that, about the same time as the Runbaken contract was negotiated, the respondent, without letting the appellant know, had purchased from another English firm the same quantity of transformers as that ordered from Runbaken, and subsequently the market for the respondent's product, that is, oil burning equipment, had fallen off due to domestic conditions.

If anything more were needed to indicate the hollowness of the respondent's statements with respect to difficulty in obtaining a permit, it is supplied in Lome's letter to the appellant of the 3rd of March, 1947, in which he advises the latter of the purchase of the additional 20,000 transformers, stating that "deliveries are starting now." He does not explain how the funds to make payment for these goods had been obtained apparently without difficulty, while a permit with respect to the Runbaken contract was not forthcoming. On the 12th of March the respondent finally decided it would not go through with the Runbaken purchase because of information received that day with respect to the oil situation in Canada. The appellant was accordingly instructed "to call off any deals that you may have made with Runbaken." The action here in question for commission was the result.

It was the opinion of the learned trial judge, concurred in by the Court of Appeal, that the Runbaken agreement did not constitute a concluded contract, and that as there had been no "purchase," the appellant had no right of action. In his opinion, the provision of the agreement with respect to an "official order" brought the case within the class of which *Spottiswoode* v. *Doreen* (1) (cited by the learned judge) is an example. That was the case of an offer by the defendants to take a lease accepted by the

(1) [1942] 2 All. E.R. 65.

plaintiffs "subject to the terms of a formal lease." In such cases, of course, there can be no binding contract unless a formal agreement is, in fact, executed. Under the agreement here in question the respondent in express terms "agrees to purchase," but it has been read as though it had contained the additional words, "but only if we subsequently send you 10 per cent of the purchase price and an official order." With respect, I think that so to construe the agreement is to imply something for which there is no foundation and which contradicts the actual language which the parties have used.

When a person agrees to purchase goods, he agrees to take and pay for them. The ordinary, commercial meaning of the words, "agrees to purchase," is "agrees to buy;" *Inland Revenue Commissioners* v. *Gribble* (1), per the Master of the Rolls and Kennedy L.J. To employ the language of Mignault J. in *Grieve McClory Ltd.* v. *Dome Lumber Company* (2), "an agreement to purchase implies a covenant to pay the purchase price." If this obligation is to be conditional only, more is required than is present in the instant case. Here, the express agreement to buy is followed only by "terms of payment" of the price including a first payment of ten per cent with "official order." As no time is fixed for this, the law would imply a reasonable time but not a condition that it would not be fulfilled at all except at the buyer's option. In my opinion, therefore, the appellant did bring about a binding contract of purchase and sale.

The respondent further contends that this purchase was not of the character described by the commission agreement, in that the Runbaken company did not undertake to lay down the goods in Canada throughout the whole period of delivery at a total cost to the respondent, after all charges, not exceeding $15. It is the respondent's contention that many things, such as ocean freight, the rate of exchange, and customs duties, might have so fluctuated within the period of two years that the cost might have risen in excess of $15. Counsel made it plain that his argument went the length that no purchase was authorized under the commission agreement except one under which a vendor in England would expressly undertake to sell at such a sum

(1) [1913] 3 K.B. 212. (2) [1923] 2 D.L.R. 154 at 164.

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from time to time as, notwithstanding future fluctuations in charges of any nature, there would never result a laid down cost to the respondent in Canada of more than $15.

In my opinion, such a contention is absurd on its face. No seller in his senses would have agreed to any such term and, therefore, it cannot be said that any two reasonable people would have contracted for the one to pay and the other to receive commissions only upon contracts of such a nature being effected. In my opinion, the agreement between the parties here meant that the price at which purchases were to be made in England would, at the time they should be made, be such that the laid down cost in Canada would not exceed $15. In the case of the Runbaken contract, the respondent was informed, as already shown, England was not more than $9.10, and it was satisfied before the contract was entered into that the price in therewith.

The respondent also points to the provision in the contract providing for revision in price, and that increased manufacturing costs might have resulted in an ultimate cost to the respondent of more than $15. This provision might have resulted in decreases in price as well as increases, and in any event, it was specifically called to the attention of the respondent in the letter with which the document was forwarded to it. Whatever might be the effect on the commission payable under the agreement in the event of the price of any of the transformers exceeding a laid down cost of $15, the presence of this term cannot, in my opinion, deprive the appellant of his right to commission.

It is next contended for the respondent that the appellant was entitled to commission only as deliveries were made in Canada, and that as no goods were delivered at all, the appellant is not entitled to anything. The law applicable is, I think, concisely laid down in the eleventh edition of Bowstead, p. 131, as follows:

> Where a principal, in breach of an express or implied contract with his agent, refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract. The measure of damages, where nothing further remains to be done by the agent is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out his contract with the agent.

The author points out at p. 127 that where the remuneration of the agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has done substantially all that he undertook to do, even if the principal acquire no benefit from his services, or the transaction in respect of which the remuneration is claimed fall through, provided that does not occur through any act or default of the agent. It will be useful, at this point, to consider the judgments of the members of this court who constituted the majority in *Whyte* v. *National Paper Company* (1).

In that case the appellant sued for commission under an agreement with the respondents by which the latter agreed to give him a commission of five per cent on all "accepted" orders obtained by him in Ontario, to be payable as soon as an order was shipped. Through the instrumentality of the appellant, a contract was entered into whereby a Toronto company "agreed to purchase" from the respondent during the period of a year, a certain description of paper to the value of not less than $35,000, delivery to be made from time to time on receipt of specifications from the purchasers and directions as to destination. When paper to the value of some $5,000 had been shipped, the purchaser refused to furnish further specifications or to take further deliveries on the ground that the paper already delivered had not been satisfactory, and the contract was not further performed.

The appellant contended that he was entitled to commission "upon all accepted orders;" that the contract in question was itself such an order; and that the failure of the respondents to supply the purchaser with the full amount of paper contracted for did not affect his right to remuneration as that failure was attributable to the default of the respondents themselves in not living up to their contract with the purchaser. The respondents, on the other hand, contended that no accepted order came into being until specifications were given by the purchaser under the contract and accepted by the respondents, and that no commission was payable unless the goods so ordered had been actually shipped. It was held by the trial judge,

(1) (1915) 51 Can. S.C.R. 162.

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Middleton J. (6 O.W.N. 83), that the parties were contracting upon the assumption that each would perform its obligations, and that the respondents could not free themselves from liability to pay commission by breach of contract with the purchaser.

This judgment was set aside on appeal (17 D.L.R. 842), but a further appeal to this court was allowed. Fitzpatrick C.J. and Idington J. accepted the view of the trial judge. The latter pointed out that if the word "shipped" meant actual shipment no matter for what reason, it would have been quite competent for the respondents to have dishonoured every order got, no matter how much labour or expense appellant might have put into obtaining it. In his view the parties could not be regarded as having contemplated any such thing and the word had therefore to be given a more reasonable meaning and not as applicable to what might, but for the default of the respondents, have been shipped. Anglin, J., with whom Davies J. agreed, thought that the better view was that the contract was not itself to be regarded as an "accepted order," but as the fact that no accepted orders were forthcoming was due to the respondents' own default, the appellant was entitled to damages in an amount equal to the commission, he having done all he had agreed to do.

In the present case, taking the view that commission was not to be payable until delivery had been made to the respondent in Canada, I think it was not in the contemplation of the parties that, where a binding contract of purchase and sale had been effected by the appellant, he would not be entitled to be remunerated if the respondent, by its own deliberate act, prevented such contract being carried out. I therefore think that as the appellant had done all that he agreed to do, and the conduct of the respondent was the cause of there being no deliveries, the former is entitled to damages in the amount he would have otherwise been entitled to be paid as commission. This action, although brought for "commission," as was the fact in *Whyte's* case, was nevertheless brought on the footing that no deliveries had been in fact made. Whether what was claimed was designated as commission or damages equal to the commission made no difference to the dispute.

Much reliance was placed by the respondent on the decision in *Luxor* v. *Cooper* (1). That case has, however, no application. There the agent was entitled to a commission only on "completion" of a sale. In fact no sale was ever made and it was held that there was no obligation as between the principal and the agent to accept any offer.

In the case at bar, however, the appellant did effect a contract of sale and purchase, and there was, as already pointed out, an obligation on the respondent under the commission agreement with the appellant to accept delivery of goods so purchased.

A point arises under the clause in the contract of purchase providing for a revision of the price in the event of changes in costs. It might have been that, had the contract been duly performed, some of the transformers might have cost the respondent more than $15. The effect of such an event upon the amount of the appellant's recovery was not discussed in argument, but taking into consideration all the circumstances, I do not think the claim can be reduced, upon the ground of such a possibility, by more than a nominal amount.

With respect to the defence that the appellant's claim had been the subject of a settlement between the parties, the learned trial judge found that the transaction referred to had no connection whatever with the claim sued upon. I see no ground upon which this finding can be disturbed. Although the point was not expressly abandoned on the argument, it was not seriously urged, and no other aspect of the transaction was argued.

In my opinion, therefore, the appeal should be allowed with costs throughout, and judgment entered in favour of the appellant for the sum of $18,121.90.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Slaght, McMurtry, Ganong, Keith & Slaght.*

Solicitor for the respondent: *David Sher.*

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(1) [1941] A.C. 108; 1 All. E.R. 33.

1951
*Nov. 15
1952
*Feb. 5

ROLAND LORTIE (PLAINTIFF).....APPELLANT;

AND

MEREDY BOUCHARD (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contract—Nullity—False representations—Whether acceptance of situation —Restitution in integrum—*Arts. 1000, 1065, 1087, 1088, 1530 C.C.*

The appellant, by his action, sought the annulment of a contract of sale of an autobus and accessories, together with its route, insurance policies and permit from the Quebec Transport Board, on the ground that there had been false representations amounting to fraud. The action was maintained by the trial judge but dismissed by the Court of Appeal for Quebec.

Held: The appeal should be allowed and the contract annulled.

Held: In his advertisement of sale and in the negotiations leading to it, the respondent made statements as to the excellent condition of the autobus and of the returns from the route which, the evidence has shown, were false; the fraudulent manœuvres—which went beyond any permissible moderate exaggerations—had the effect of leading the appellant to enter into a contract which he would not have entered into had he been in possession of the real facts. The declaration in the contract that the autobus was bought in its actual condition of repairs clearly meant that he took it in the condition represented to him by the respondent.

Held also: As the defects had only appeared gradually, no acceptance of the situation can be imputed to the appellant by the facts that he kept the autobus and had repairs done to it and took action only when he found that he had virtually no other recourse; the rule in Art. 1530 C.C. that the action to annull for hidden defects must be taken with reasonable diligence, is not so strict when there is fraud involved and a formal warranty, and in the circumstances of this case, it cannot be said that there had been acceptance nor that the action was late. Moreover, acceptance is a question of fact on which the trial judge found in favour of the appellant.

Held further: The *restitutio in integrum*, without which a declaration of nullity for fraud cannot be obtained, is not possible in this case, but as the evidence shows that the deteriorations were not due to the fault of the appellant, the conditions of Art. 1087 C.C. are met and the respondent must receive the objects of the sale in the state in which they are without diminution of the price.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), allowing the appeal from the decision of the trial judge and dismissing an action asking the nullity of a contract for false representations.

*PRESENT:—Rinfret C.J. and Taschereau, Rand, Estey and Fauteux JJ.

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Gustave Monette, K.C., and Maurice Gagné, K.C., for the appellant. The question whether or not there was fraud is a question of fact and the evidence viewed as a whole justifies the finding of the trial judge that there had been false representations made in order to induce the appellant to purchase.

The evidence was rightly permitted by the trial judge. It is recognized doctrine in Quebec that a party may by oral evidence contradict or vary the terms of a written instrument, when the purpose of the oral evidence is to establish fraud of one of the parties (*Raleigh* v. *Dumoulin* (1) and *Simard* v. *Tremblay* (2)). Moreover, the respondent himself introduced the oral evidence by questioning the appellant on discovery upon the representations made by the respondent prior to the sale.

There was no acceptance by the appellant of such a nature as to deprive him of the recourse in nullity of the contract. The case of *Sirois* v. *Demers* (3), applied by the Court of Appeal to this case, has no application in view of the special nature of the contract and since that case was a case under the legal warranty of latent defects.

It is claimed by the respondent that because four months elapsed between the purchase and the action, the action is barred by the operation of Art. 1530 C.C. and that that delay must be interpreted as an acceptance. That is not so, because Art. 1530 C.C. only applies where a contract is attacked for latent defects under the legal warranty. Our case is not one like that. It is an action in nullity based on the fraud and false representations. In these circumstances, Art. 1530 C.C. does not apply (*Touchette* v. *Pizagalli* (4), *Bernier* v. *Grenier Motor Co.*, (5) and *Patterson* v. *Wembley Garage* (6)).

Moreover, even if the action could be said to fall under Art. 1530 C.C., under the particular circumstances of this case, the delay is not too long and stays within the conditions of that article (*Francœur* v. *Doucet* (7)). Even if the action were one for latent defects, a delay of four months would be reasonable here in view of the fact that

(1) [1926] S.C.R. 551.
(2) Q.R. 46 K.B. 158.
(3) Q.R. [1945] K.B. 318.
(4) [1938] S.C.R. 433.
(5) Q.R. 41 K.B. 488.
(6) Q.R. 37 R.L. (N.S.) 379.
(7) K.R. [1938] K.B. 460.

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the business could not be tested without having been operated for sometime and without both motors having been given a fair trial.

To the contention that the stipulation in the contract to the effect that the autobus is sold in the state of repairs in which it was at the time of the sale, prevents the appellant from claiming the nullity on account of fraud, it is answered that this cannot be the meaning of such a clause, but rather that the autobus was in the condition in which it was represented to be by the respondent. The clause was dictated by the respondent and it cannot be interpreted as a clause excluding any warranty whatever nor as a clause permitting the respondent to deliver to his purchaser something different from what the latter had intended to purchase.

The *restitutio in integrum* was made and any deteriorations cannot be imputed to the appellant but are the sole responsibility of the respondent.

L. A. Pouliot, K.C., and Rolland Legendre for the respondent. The appellant did not establish false representations giving rise to an action in annulment of the deed of purchase.

The verbal evidence, moreover, tendered by the appellant is illegal as tending to contradict or vary the deed of purchase in writing (Art. 1234 C.C.).

The appellant's action is ill founded in law because (*a*) he has utilized the autobus and made acts of acceptance of the thing sold with full knowledge and has acted as absolute master of same, even making changes to the thing; (*b*) he did not make a *restitutio in integrum* as he was bound to do to obtain the annulment of the sale, and (*c*) the action was tardy.

The following authorities were cited *inter alia* by the respondent: Benjamin On Sale, 6th Edition; *Digney* v. *Roberts* (1); *Desrochers* v. *Patenaude* (2); *Lincourt* v. *Généreux* (3); *Sirois* v. *Demers* (4) and *Ledoux* v. *Motors Supply Ltd.* (5).

(1) [1937] 3 D.L.R. 780.
(2) Q.R. 33 R.L. (N.S.) 448.
(3) Q.R. [1944] S.C. 438.
(4) Q.R. [1945] K.B. 318.
(5) Q.R. 36 R.L. (N.S.) 72.

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The CHIEF JUSTICE:—J'ai eu l'avantage de prendre connaissance du jugement préparé en cette cause par mon collègue, le Juge Taschereau, et je concours dans ses conclusions pour les raisons qu'il exprime.

The judgment of Taschereau, Rand and Estey JJ. was delivered by

TASCHEREAU, J.:—Le demandeur-appelant demande la nullité d'un contrat intervenu entre lui-même et l'intimé, le 27 août 1946, en vertu duquel ce dernier lui a vendu un autobus, et réclame en outre le remboursement d'une somme de $7,500, prix d'achat versé comptant lors de la signature de l'acte reçu devant Jobidon, N.P. La Cour Supérieure, présidée par M. le Juge Gibsone, a maintenu cette action, mais la Cour d'Appel (1), MM. les Juges Casey et Bertrand dissidents, l'a rejetée avec dépens.

C'est la prétention de l'appelant qu'il a été la victime de fausses représentations de la part de l'intimé, et que n'eurent été ces manœuvres dolosives, il ne se serait jamais porté acquéreur de cet autobus, du permis de la Régie Provinciale autorisant son opération, ni de la clientèle que le défendeur aurait surestimée. Lors de l'argument, l'appelant s'est désisté du moyen allégué dans sa déclaration, et résultant des défauts cachés de la chose.

L'intimé soutient qu'il n'y a pas eu de fausses représentations, que l'appelant a accepté l'autobus ainsi que tout ce qu'il a acheté, en toute connaissance de cause, qu'il s'en est servi, que l'action est tardive, et qu'à tout événement, il n'y a pas de *restitutio in integrum,* condition essentielle à l'annulation de la vente.

En vertu du contrat, le demandeur a acheté un "autobus de marque Reo, modèle 1933, de 25 places"..., *"le tout dans son état d'entretien actuel"*... "tous les droits quelconques acquis au vendeur de la Régie Provinciale du Transport"... "toute la clientèle ou achalandage dudit vendeur comme opérateur d'autobus"..."tous les outils et accessoires quelconques dudit autobus"..."l'occupation d'un garage dans le village de St-Grégoire à raison de $10.00 par mois jusqu'au 1er novembre 1946, et à raison de $15.00 à partir du 1er novembre 1946 au 1er mai 1947"..."le moteur de rechange qui se trouve dans le garage du vendeur"...

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"pour et en considération de la somme de $7,500 payée comptant". Pour donner suite à cette entente, le demandeur a pris livraison de l'autobus le 30 août 1946, a obtenu le transfert des polices d'assurance de même que du permis de la Régie Provinciale, l'autorisant à opérer la ligne entre le village de St-Grégoire et le moulin de la Dominion Textile, pour le bénéfice des travailleurs qui y sont employés.

C'est comme conséquence d'une annonce parue dans "L'Action Catholique", journal de Québec, que le demandeur qui est de Beauport, est entré en négociations avec le défendeur, domicilié à St-Grégoire. Les 8 et 14 août 1946, ce quotidien publiait:

AUTOBUS À VENDRE

AUTOBUS REO, vingt-sept passagers (27), carrosserie neuve deux ans, *mécanisme parfait ordre.* Différentiel, Clutch, Moteur et frein *neuf,* et aussi permis pour quelqu'un intéressé. Prix intéressant pour acheteur prompt et sérieux. Cause de santé. Tél.: 4-5091.

Les deux frères du demandeur, Arthur et Émile Lortie, furent les premiers à prendre connaissance de cette annonce, et après avoir communiqué avec le défendeur, allèrent le rencontrer à St-Grégoire le 11 août, pour obtenir des informations. Ils y retournèrent de nouveau, mais cette fois avec le demandeur, une semaine plus tard, soit le ou vers le 18 du même mois. Tous deux portaient un intérêt particulier à cette transaction, car de concert avec leur père, ils songeaient à trouver une situation au demandeur, à peine âgé alors de 25 ans.

Au cours de la première entrevue, d'après le témoignage d'Arthur et d'Émile Lortie, le défendeur leur aurait représenté que l'autobus, qui était *en parfait ordre,* pouvait valoir entre $12,000 et $15,000. Il leur aurait dit qu'il s'agissait bien d'un Reo 1933, 27 places, que la *carrosserie avait été renouvelée deux ans auparavant,* que les freins, le différentiel et les pneus étaient *neufs,* que le moteur qui avait été percé une fois, pouvait encore être utilisé pour 10,000 à 15,000 milles, que tout le mécanisme *était en excellente condition.* Quant au moteur de rechange, il n'avait servi que *très peu.* La clientèle rapportait quotidiennement de $25 à $30 les jours de beau temps, et $30 à $35 les jours de pluie. De plus, les excursions les dimanches et jours de congé augmentaient substantiellement les revenus. Selon lui, Bouchard détenait pratiquement toute la clientèle de la

Dominion Textile, et c'est un nommé Guimont, un compétiteur, qui transportait le surplus des voyageurs. Malgré l'*excellent état* de son autobus, Bouchard aurait été disposé à le vendre pour $8,500. Les deux frères du demandeur qui ne sont pas des mécaniciens, et qui n'ont aucune expérience dans l'automobile, n'ont pas examiné l'autobus, mais quelques instants avant de quitter le défendeur, ils se sont rendus au garage où Bouchard a fait tourner le moteur, et les a invités à monter s'asseoir à l'intérieur de la voiture.

Au cours de la seconde entrevue à laquelle le demandeur était présent avec ses deux frères, le défendeur aurait réaffirmé ses déclarations de la semaine précédente quant à la valeur de son autobus et *l'excellente condition dans laquelle il se trouvait.* Il aurait également répété ce qu'il avait auparavant affirmé relativement à la clientèle et aux revenus qu'il retirait de son exploitation. Il aurait ajouté cependant que son autobus était équipé d'un châssis courbé, et non pas d'un châssis droit, qui ne convient pas à un véhicule de ce genre. Avant de se séparer, le demandeur et ses deux frères, accompagnés de Bouchard le défendeur, se sont rendus à bord de l'autobus au moulin de la Dominion Textile et, apparemment, rien d'anormal ne fut remarqué. Le demandeur explique que l'autobus roulait sur de très beaux chemins et qu'il était "allège". Le demandeur a fait une deuxième visite, accompagné de son jeune frère, l'abbé Gérard Lortie, le 22 août, alors que *les mêmes représentations* leur auraient été faites par le défendeur.

Enfin, durant la journée du 24 août, M. Napoléon Lortie, père de l'appelant, qui consentait à lui procurer les fonds nécessaires pour lui permettre de se porter acquéreur de l'autobus, rencontra l'intimé deux fois. A leur première entrevue, qui fut très courte, on a convenu de se rencontrer de nouveau le soir du 24, date où expirait l'offre de vente, car d'après l'intimé, si l'acheteur ne signait pas le contrat ce jour-là, il vendrait à un autre acheteur. Ce soir-là, M. Napoléon Lortie, accompagné du demandeur Roland et de son autre fils, l'abbé Gérard, s'est rendu au garage de l'intimé, a vu l'autobus, ainsi que le moteur de rechange. L'intimé donna à M. Napoléon Lortie *à peu près les mêmes informations* qu'il avait données précédemment, *sur l'excellente condition de son autobus,* et il fut en conséquence, à cause de ces représentations, décidé de signer un contrat.

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Un document préliminaire fut signé ce soir-là, un acompte de $500 fut versé, et le 27, le contrat définitif fut exécuté devant Jobidon, N.P. La vente fut conclue pour un prix convenu de $7,500.

Il fut aussi entendu que l'intimé continuerait à opérer la ligne pour le bénéfice de l'appelant durant quelques jours, jusqu'à ce que ce dernier puisse se trouver une pension à St-Grégoire, et jusqu'à ce qu'il ait abandonné le travail qu'il faisait pour son père à Beauport. L'appelant arriva à St-Grégoire le 29 août dans la soirée, et l'intimé lui remit alors le produit des opérations d'une journée et demie, temps écoulé depuis la signature du contrat. Ces recettes n'étaient que de $6 ou $7, et l'appelant a immédiatement manifesté son désappointement, surtout après les représentations formelles qui lui avaient été faites par l'intimé. L'appelant commença à opérer personnellement le service le 30 août, et c'est alors que les troubles se multiplièrent, de même que les défauts de mécanisme qui ont amené la présente action.

Durant les quatre mois qu'il se servit de l'autobus, l'appelant eut maintes occasions de constater que l'annonce publiée dans "L'Action Catholique", de même que les représentations faites par l'intimé, n'étaient pas l'expression de la vérité, et contenaient des affirmations qu'on ne saurait imputer à de simples erreurs.

La preuve révèle que cet autobus n'est pas de marque Reo, modèle 1933. Il est un ancien Gotfredson, modèle 1928, reconstitué par le rassemblement de vieilles pièces rapportées, et provenant de diverses sources. Il n'est pas plus un Reo qu'il n'est un Gotfredson ou un General Motors. La carrosserie est celle d'un ancien Chevrolet; *elle n'est pas neuve de deux ans* tel que représenté, mais elle est une très ancienne carrosserie, mise au rancart à St-Hyacinthe, sur le bord d'une rivière, pour être éventuellement détruite à cause de son état de vétusté; elle fut néanmoins posée sur le châssis de l'autobus vendu, en 1943, par un M. Prévost de Ste-Claire, qui y installa les sièges de l'ancienne, devenue complètement hors d'usage. Elle n'était pas imperméable, et la pluie qui y pénétrait incommodait fort les passagers. Elle vibrait d'une façon anormale aussitôt que le véhicule atteignait une vitesse de quinze milles à l'heure. Le châssis, de marque Gotfredson, au lieu d'être courbé, était droit, et évidemment cassé lors de la vente, car l'appelant dut le

faire souder vu que la voiture menaçait de s'effondrer sous le poids des passagers. L'essieu d'en avant et d'arrière, le volant, le grillage antérieur, étaient de marque General Motors. L'embrayage, la transmission, le radiateur, étaient de fabrication Reo. Cet embrayage fut remplacé à cause de nombreuses défectuosités, et la transmission nécessita plusieurs réparations par suite de son usure. Les freins qui perdaient leur huile, ne fonctionnaient à peu près pas, et les pneus étaient pratiquement finis. L'arbre de couche était faux, et était évidemment la cause de la vibration de tout le véhicule que j'ai signalée déjà. Le moteur qui se trouvait sur l'autobus lors de la prise de possession par l'appelant, était dans un état extrême de délâbrement. Il brûlait une grande quantité d'huile; et la fumée de son tuyau d'échappement projetait à l'intérieur de la carrosserie une fumée intolérable. Les batteries faisaient défaut, tellement qu'il fallut installer un nouveau générateur.

Par suite des nombreuses difficultés qu'il éprouvait, l'appelant décida, dans le cours du mois d'octobre, de faire enlever le moteur et de le remplacer par l'autre moteur de rechange qu'il avait acheté, et que l'intimé lui avait représenté comme étant *en parfait ordre*. Le garagiste de St-Grégoire de Montmorency à qui l'ouvrage fut confié, M. Émilien Lesage, trouva immédiatement que ce moteur n'était pas en ordre et qu'il fallait *percer* les cylindres. Cet ouvrage, à cause de sa nature délicate, fut exécuté par la maison P. L. Lortie, de Québec, et l'intimé admet dans son témoignage que ce moteur n'était pas neuf, mais au contraire, qu'il avait été percé déjà et qu'il avait servi de 1938 à 1944, c'est-à-dire durant environ six ans. Après les réparations à ce moteur, il roula de façon assez satisfaisante jusqu'à ce qu'arriva la saison d'hiver. Durant le mois de décembre, les troubles recommencèrent de nouveau puisqu'il y avait des fuites d'eau impossibles à réparer à cause du manque de pièces, et qu'il était en conséquence inutile d'y placer de l'antigel. Il arriva que le moteur gela à la fin de décembre 1946. La situation était si mauvaise, que l'appelant a dû laisser l'autobus au garage à maintes reprises, et plusieurs fois durant l'automne, il dut louer de la Compagnie d'Autobus de Charlesbourg un autre véhicule à raison de $25 par jour, afin de pouvoir continuer son service.

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Entre le 27 août, date où fut signé le contrat, et le 31 décembre 1946, l'appelant dépensa $1,080.67 en réparations, et dut payer également $250 pour la location d'un autre autobus.

De plus, cet autobus était loin de valoir entre $12,000 et $15,000, tel que l'avait représenté l'intimé au demandeur lui-même, à son père et à ses trois frères. Il fut acheté à un encan en 1928 par un M. J. A. Fortier qui, en 1936, le vendit à P. L. Lortie pour le prix de $1,300. L'intimé lui-même l'acheta en 1937 de P. L. Lortie pour $3,200, payé en partie en argent et en partie par l'échange d'une autre voiture. M. Omer Forgues qui, en 1946, était à l'emploi de la Commission des Prix et du Commerce en temps de guerre, et qui représentait le contrôleur des véhicules-moteurs, nous dit que cet autobus, à la date de l'achat, valait au plus $1,500.

Dans le cours du mois de mai 1947, le demandeur fut incapable de louer un nouvel autobus et s'efforça, en conséquence, d'opérer avec l'autobus acheté de l'intimé, mais la Régie Provinciale lui refusa son permis parce que ledit autobus était trop défectueux, et qu'il n'offrait pas des conditions de sécurité nécessaires pour le transport des passagers. Les compagnies d'assurance refusèrent le renouvellement des polices pour des raisons identiques. Ces faits, qui sont postérieurs à l'action, ont été allégués par l'appelant dans une réponse supplémentaire, avec la permission de la Cour Supérieure accordée en vertu des dispositions de l'article 199 du Code de procédure civile.

Les revenus étaient également substantiellement différents de ce que l'intimé avait représenté. Jamais les recettes ne furent supérieures à $15 par jour, quelle que fût la température, et la moyenne quotidienne était entre $7 et $15. Durant les mois de septembre, octobre, novembre et décembre, les recettes ne furent même pas égales au coût des réparations et au prix de location d'un autre autobus, et par suite du mauvais état de la voiture, les excursions du dimanche et des jours de congé furent impossibles.

Nous sommes bien loin des faits représentés dans l'annonce de "L'Action Catholique", et au cours des conversations intervenues, où l'on annonçait un autobus Reo, *carrosserie neuve de deux ans,* dont le mécanisme était *en parfait ordre,* pourvu d'un différentiel, d'un embrayage, d'un

moteur et de freins neufs, enfin, d'une machine *en excellente condition.* Les faits ont démontré que l'appelant, à cause des représentations de l'intimé n'a pas obtenu pour son argent, la valeur à laquelle il avait droit de s'attendre. C'est d'ailleurs la conclusion à laquelle en est arrivé le juge au procès qui qualifie justement de "fausses et trompeuses" les représentations faites par l'intimé.

Certes, un vendeur n'est pas tenu de déprécier sa marchandise; il peut même la "farder" quelque peu, ou si l'on veut en exagérer modérément les qualités existantes, mais la loi interdit les manœuvres dolosives, celles-là qui font naître l'erreur dans l'esprit de l'autre partie contractante, et la déterminent à agir (C.C. 993). Dans ce cas, il y a clairement dol, et le contrat est en conséquence annulable. C'est évidemment ce qui s'est produit dans le cas qui nous est soumis. Nous ne sommes pas en présence de l'exagération qu'un vendeur honnête peut se permettre, sans violer les lois qui autorisent la résiliation des contrats, mais nous sommes plutôt devant des affirmations et des représentations sans fondement, qui ont induit l'appelant en erreur et qui l'ont poussé à signer le contrat dont il demande maintenant l'annulation.

La Cour d'Appel (1), avec la dissidence de MM. les Juges Casey et Bertrand, qui sont d'avis qu'il y a eu des manœuvres dolosives, base surtout son jugement sur le fait que l'acheteur a acquis l'autobus "dans son état d'entretien actuel", que l'acheteur savait qu'il s'agissait d'une ancienne voiture ayant subi de nombreuses transformations, que les défauts existants étaient de constatation facile, qu'il a gardé l'autobus après les avoir constatés et y avoir effectué des réparations, que l'action est tardive, et qu'enfin la *restitutio in integrum* de la part du demandeur était impossible au moment de l'institution de l'action.

Je ne puis, avec déférence, me rallier à ce raisonnement. Il ne s'agit pas dans la présente cause d'une demande en annulation pour défauts cachés, mais bien d'une demande en annulation pour fausses représentations. L'acheteur était de bonne foi; il était justifié de croire à la parole du vendeur qui vantait les qualités de sa voiture, et il avait raison de penser que la marchandise qu'il achetait était à peu près de valeur égale à celle qu'on lui avait représentée.

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S'il avait simplement acheté une voiture de "seconde main", sans que la vente ne fût accompagnée de représentations, la situation des parties eut été peut-être différente. Mais tel n'est pas le cas. Quand le demandeur a acheté cet autobus et que devant le notaire Jobidon, il a été stipulé qu'il en faisait l'acquisition "dans son état d'entretien actuel", il est certain qu'il référait à l'état de la voiture tel que représenté par le défendeur. Il n'achetait pas une voiture rapiécée, dans l'état où la preuve révèle qu'elle était, mais bien une voiture dans l'état où le défendeur lui avait dit qu'elle était, avec l'usure normale et ordinaire attachée à cet état.

On reproche à l'appelant d'avoir gardé l'autobus après avoir connu les défauts, et d'y avoir fait faire lui-même les réparations, ce qui équivaudrait à une acceptation de sa part, et l'empêcherait ainsi de réclamer maintenant l'annulation de la vente. Il ne faut pas oublier cependant que les défauts se sont manifestés graduellement, et qu'au début, les troubles constatés par le demandeur n'étaient pas très sérieux; ce n'est qu'avec le temps qu'il a réalisé qu'ils étaient plus graves, et chaque fois qu'il en parlait à l'intimé, ce dernier s'efforçait de temporiser et de faire croire à l'appelant qu'ils étaient sans importance. Et c'est comme résultat de l'accumulation de tous ces défauts, qui n'ont pas pris tous le même temps à se manifester, que le demandeur a enfin institué son action au bout de quatre mois, après avoir essayé de réparer les défectuosités qu'il constatait et qui allaient toujours en augmentant. D'ailleurs, ce n'est qu'au mois de novembre, quand il a réalisé que le premier moteur fonctionnait mal, qu'il a été possible au demandeur de constater également par le changement qu'il a opéré, que le second moteur n'était pas meilleur, qu'il n'était pas tel que représenté, et qu'il était inapte au service auquel il était destiné.

Je ne crois pas qu'il y ait eu acceptation de l'état de choses par le demandeur, ni que son action soit tardive. Il est entendu, et la jurisprudence reconnaît bien le principe que lorsqu'il s'agit d'une demande en annulation de contrat pour vices cachés de la chose, l'article 1530 C.C. doit trouver son application, et l'action doit nécessairement être instituée *avec diligence raisonnable*. Mais la règle a moins de rigueur quand il s'agit de fausses représentations, et la même célérité n'est pas une condition essentielle à la

réussite de l'action. La cause de *Sirois* v. *Demers* (1) n'a pas d'application. Il s'agissait dans cette affaire de l'annulation d'un échange d'automobile, mais ce recours a été refusé parce que le demandeur y aurait renoncé, en faisant faire lui-même les réparations que le défendeur s'était obligé à payer. C'est plutôt la cause de *Bernier* v. *Grenier Motor Co. Ltd.*, (2), jugement confirmé par cette Cour (3), qui doit nous guider dans la détermination du présent litige. Dans cette cause, la Cour d'Appel a décidé que l'article 1530 C.C. applicable au cas de demande en nullité pour vices rédhibitoires, ne l'est pas dans le cas où il s'agit de garantie conventionnelle et formelle, et l'action en résolution peut alors être intentée après les délais fixés par cet article, surtout lorsque le demandeur allègue et prouve erreur, *dol, fraude et fausses représentations.* (*Vide* également *Silver* v. *Drennan* (4); *Lefebvre* v. *Montpetit* (5); *Poulin* v. *Grégoire* (6).

Il y aura certainement des cas où une action, intentée trop tard après la découverte de défauts de la chose vendue, même s'il y a eu dol ou fausses représentations, ne pourra réussir, mais dans le cas qui nous occupe, si l'on tient compte des circonstances relatées plus haut, je ne puis en venir à la conclusion qu'il y a eu acceptation par le demandeur, ni que son action soit tardive. Il ne faut pas d'ailleurs oublier que la question de savoir si la conduite d'un acheteur peut nous amener à conclure qu'il y a eu acceptation de façon à le priver d'une action rédhibitoire, est une question de faits, et dans le cas qui nous occupe, le juge au procès l'a résolue en faveur de l'appelant. (*Touchette* v. *Pizzagalli* (7)).

Il reste la question de savoir si le demandeur a offert avec son action tout ce qu'il a reçu, et si la *restitutio in integrum* de sa part est possible. Ce dernier n'a pas seulement acheté un autobus et un moteur de rechange, mais il s'est également porté acquéreur de la clientèle du défendeur ainsi que du permis détenu par ce dernier et émis par la Commisison de Régie Provinciale. Le demandeur ne peut réussir que s'il peut remettre au défendeur tout ce qu'il a obtenu comme résultat du contrat intervenu. Il est en effet

(1) Q.R. [1945] K.B. 318.
(2) Q.R. (1926) 41 K.B. 488.
(3) [1928] S.C.R. 86.
(4) Q.R. (1922) 60 S.C. 120.
(5) Q.R. (1922) 60 S.C. 202.
(6) Q.R. (1923) 34 K.B. 449.
(7) [1938] S.C.R. 443.

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de principe, que par le jugement à intervenir les parties doivent être remises dans le même état, comme si le contrat n'avait jamais existé. Chaque partie doit rendre ce qu'elle a reçu, et le *statu quo* antérieur doit être rétabli. L'article 1000 C.C. stipule que l'erreur, le dol, la violence ou la crainte donnent un droit d'action pour faire annuler ou rescinder les contrats qui en sont attachés. L'article 1065 C.C. est également à l'effet que quand l'une des parties à un contrat ne remplit pas son obligation, la résolution du contrat d'où naît cette obligation peut être demandée. Il est clair cependant que la *restitutio in integrum* doit être possible, mais la règle qui gouverne en ce cas, est la même que celle que l'on trouve à l'article 1088 C.C., c'est-à-dire que la condition résolutoire, lorsqu'elle est accomplie, oblige chacune des parties à rendre ce qu'elle a reçu et remet les choses au même état que si le contrat n'avait pas existé. En ce qui concerne les choses qui ont péri ou qui ont été détériorées, c'est alors la même règle que celle contenue à l'article 1087 C.C. qui trouve son application, c'est-à-dire que si la chose ne peut plus être livrée, ou si elle a été détériorée *sans la faute du débiteur,* le créancier doit la recevoir dans l'état où elle se trouve sans diminution de prix. (*Vide*: Mignault, Vol. 5, pages 241, 448 et 449.)

Dans le cas qui nous occupe, le demandeur a offert dans son action de remettre et livrer au défendeur, sur paiement de la somme de $7,500, tout ce qui est mentionné au contrat Exhibit P.1, ce qui évidemment comprend l'autobus, le moteur de rechange, la clientèle et les outils. En ce qui concerne le permis d'opérations, il déclare le maintenir aux frais et dépens de même qu'aux risques et périls du défendeur, afin que ce permis ne soit pas révoqué par la Régie Provinciale de façon à pouvoir, après jugement, le remettre au défendeur. Il est possible que l'autobus et le moteur de rechange ne soient pas en aussi bon état que lorsque le demandeur les a reçus, mais je ne crois pas *qu'aucune faute* puisse lui être imputée. Quant à la clientèle, si elle a été réduite, et quant au permis, s'il a été révoqué au mois de mai 1947, le défendeur ne pourra s'en prendre qu'à lui-même. C'est à cause du mauvais état de l'autobus que la clientèle a diminué, et que le permis a été révoqué.

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Pour toutes ces raisons, je suis d'opinion que le présent appel doit être maintenu avec dépens de toutes les cours.

FAUTEUX, J.:—Pour les raisons données par M. le Juge Taschereau, je maintiendrais l'appel avec dépens de toutes les Cours.

Appeal allowed with costs.

Solicitors for the Appellant: *Prévost, Gagné and Flynn.*

Solicitors for the Respondent: *Lessard, Legendre and Levesque.*

CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF) ..... APPELLANT;

AND

DAME ETHEL QUINLAN KELLY (DEFENDANT) ..... RESPONDENT.

1951

* Nov. 13, 14

1952

* Apr. 22

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Wife—Common as to property—Promissory note for board and lodging signed jointly by husband and wife—Whether debt of the community—Whether wife obliged herself "with or for" her husband—Alimentary pension—Natural obligation—Arts. 165, 173, 1301, 1317 C.C.

The respondent, common as to property, lived with her husband and daughter in the appellant's hotel in Montreal from April 1932 to May 1934. The accounts for board and lodging were rendered weekly in the names of the three who had signed the hotel register. During their stay, the accounts were frequently paid by cheques drawn by the respondent on her own bank account. However, the accounts were not paid regularly with the result that arrears gradually accumulated. Two promissory notes, signed by the respondent and endorsed by her husband, were given to the appellant at different dates, and then on June 20, 1939, a new note, signed jointly and severally by the respondent and her husband, was taken. The action, based on that last note, was maintained against the husband (who did not appeal), and dismissed against the respondent. The judgment dismissing the action as against the respondent was affirmed by a majority in the Court of Appeal for Quebec.

Held (The Chief Justice and Kellock J. dissenting), that the appeal and the action should be dismissed.

PRESENT: Rinfret C.J. and Taschereau, Kellock, Cartwright and Fauteux JJ.

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Per Taschereau, Cartwright and Fauteux JJ.: The debt, being a liability of the community, was the debt of the husband, and by signing the note—assuming that the wife bound herself *ex contractu* to pay it—she obliged herself with and for her husband otherwise than as prescribed for by Art. 1301 C.C., since the husband remained at all times the debtor.

The argument that in view of the lack of means of the community and of the husband and in view of the capacity of the wife to support that charge of the marriage, the wife became by virtue of Arts. 165, 173 and 1317 C.C. legally obliged, is not tenable because the evidence does not disclose any of the circumstances which would enable the husband to claim from the respondent an alimentary pension, and therefore, even if third parties could invoke the rights of a husband against his wife for alimentary pension (which is doubtful), the appellant could not do so in this case.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming, St-Germain J.A. dissenting, the dismissal as against a wife of an action on a promissory note signed jointly and severally by the wife and her husband for the payment of board and lodging.

L. E. Beaulieu, K.C., and *L. G. Prévost, K.C.*, for the appellant. The promissory note was given in voluntary execution of a natural obligation and is therefore legally binding on the respondent under Art. 1140 C.C. There was a natural obligation morally binding on respondent who voluntarily acknowledged it. By so doing, respondent personally assumed a civil obligation towards the appellant which the respondent undertook to execute and discharge out of her own personal property by means of the promissory note. That such a note was given for a valid consideration cannot be disputed in the face of our doctrine and jurisprudence. It is now too late for the respondent to attempt to repudiate the natural obligation which has been converted into a civil obligation by the mere effect of the respondent's voluntary acknowledgment. *Pesant* v. *Pesant* (2).

The respondent signed the note in execution of a legal obligation. She had, under Arts. 165, 173 and 1317 C.C., the legal obligation to pay the hotel account. *Debien* v. *Dumoulin* (3), *Montminy* v. *Paquet* (4), *Dubeau* v. *Greffe* (5) and *Faucher* v. *Larue* (6).

(1) Q.R. [1950] K.B. 79.
(2) [1934] S.C.R. 249.
(3) Q.R. 56 S.C. 271.
(4) Q.R. 69 S.C. 574.
(5) Q.R. 20 R.L. (N.S.) 15.
(6) Q.R. 57 S.C. 502.

Article 1301 C.C. does not apply in the case of a promissory note given by the wife in execution of a natural or legal obligation. That Article supposes that the wife has entered into a contractual obligation for or with her husband. It does not absolve the wife from an obligation created by law. If it did, it would create an exception to the rule of Arts. 165 and 173, and no such exception is made by these articles. In signing with her husband, she did not bind herself to anything to which she was not already personally subject, as the obligation to supply life's necessaries is a paramount one, imposed on each consort by law and by nature.

Article 1301 C.C. does not apply because the respondent did not become surety for her husband debt. The wife has the burden of showing that she bound herself for her husband; that she really became the surety of her husband for his purpose and benefit; that she herself derived no personal benefit from the transaction; and that the debt was not her affair in any way. The evidence shows that although the respondent signed with her husband, she undertook to fulfil her own natural or legal obligation and that she derived personal benefit when she received food and shelter at appellant's hotel with her own minor daughter whom she was naturally and legally bound to support when her husband was not in a position to do so. *La Banque Canadienne Nationale* v. *Audet* (1).

The appellant is a creditor in good faith and if Article 1301 C.C. applies he is within the exception provided in that article.

C. M. Cotton, K.C., for the respondent. The consideration for the original note of which the note sued upon is the last renewal, was solely a liability of the community, that is, an obligation of the husband of the respondent as head of the community. This debt falls squarely within the provisions of Art. 1280 C.C.

It is established by the authors and by the jurisprudence that for such a community obligation, the respondent could not be personally responsible. *Hudon* v. *Marceau* (2), *Frigon* v. *Coté* (3) and *Montminy* v. *Paquet* (4).

(1) [1931] S.C.R. 293.
(2) 23 L.C.J. 45.
(3) 1 Q.L.R. 152.
(4) Q.R. 69 S.C. 561.

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It results therefore that the respondent, in signing the note, bound herself with and for her husband; and under the provisions of Art. 1301 C.C. and 1374 C.C., no action lies against the respondent on the note, nor can any judgment be rendered against her thereon. There is no article in the Code Napoléon corresponding to this article, whose provisions are of public order. *Banque Canadienne Nationale* v. *Carette* (1), and *Banque Canadienne Nationale* v. *Audet* (2).

The CHIEF JUSTICE (dissenting): J'ai eu l'avantage de prendre connaissance du jugement préparé par mon collègue, le Juge Kellock, et je concours avec lui.

Je tiens seulement à ajouter les commentaires qui suivent, surtout après avoir rendu moi-même, au nom de la Cour Suprême du Canada, les jugements dans les causes antérieures, où nous avons eu à appliquer l'article 1301 du *Code Civil* de la province de Québec (*Laframboise* v. *Vallières* (3); *Rodrigue* v. *Dostie* (4); *Banque Canadienne Nationale* v. *Carrette* (5); *Banque Canadienne Nationale* v. *Audet* (6) et *Sterling Woollens & Silks Company* v. *Lashinsky* (7)).

Dès l'abord, il est peut-être à propos de faire remarquer que dans chacune de ces affaires le jugement de cette Cour a été unanime.

Pour moi, ce qui distingue toutes ces causes de l'espèce actuelle est que, dans chacune d'elles, il s'agissait d'une femme mariée qui avait garanti la dette de son mari, tandis qu'ici, il s'agit tout simplement de la dette de la femme elle-même.

Le billet qui fait l'objet de l'action de l'appelante est signé par l'intimée, Dame Ethel Quinlan Kelly. A sa face, elle est donc responsable à la fois à raison de la promesse de paiement qu'il contient et à raison de sa signature.

Pour s'y soustraire, il lui faut nécessairement invoquer l'article 1301 du *Code Civil* et justifier que son cas est couvert par cet article.

(1) [1931] S.C.R. 35.
(2) [1931] S.C.R. 293.
(3) [1927] S.C.R. 197.
(4) [1927] S.C.R. 563.
(5) [1931] S.C.R. 33.
(6) [1931] S.C.R. 293.
(7) [1945] S.C.R. 762.

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Il convient tout d'abord de rappeler que par l'expression "s'obliger" le *Code*, dans cet article, vise uniquement le cautionnement de la femme avec ou pour son mari. Comme cette Cour l'a fait remarquer dans la cause de *Banque Canadienne Nationale* v. *Audet*, citée ci-dessus, cette interprétation est maintenant fixée dans la jurisprudence de la province de Québec. La Cour du Banc du Roi l'a affirmée dans *Lebel* v. *Bradin* (1), et elle a été confirmée par la Cour Suprême dans les différents arrêts auxquels il est référé plus haut.

Je cite ce passage du jugement *re Audet*, à la page 302:

Il ne manque pas d'arrêts dans la jurisprudence de la province de Québec où la femme mariée a été condamnée, malgré que son obligation fût solidaire avec son mari. Nous pourrions citer maintes et maintes causes où elle a été tenue responsable pour avoir signé des billets promissoires avec lui. Il suffira de rappeler le jugement du Conseil Privé dans la cause de la Banque d'Hochelaga *v.* Jodoin (1895 A.C. 612). En cette affaire, les exécuteurs testamentaires de madame Jodoin poursuivaient la Banque d'Hochelaga en revendication de certaines actions de compagnies transférées à la banque en garantie de billets promissoires "signed by the husband in his own name and also in her name as her 'procureur' or attorney".

Madame Jodoin était donc obligée solidairement avec son mari. Elle fut condamnée sur le motif que "the whole affair was the wife's affair... The wife certainly had the benefit of the advances".

On voit que le fait de solidarité n'a pas empêché sa condamnation; l'existence de la solidarité n'a pas été jugée suffisante pour entacher d'illégalité l'obligation qu'elle avait contractée.

Et, encore, page 307:

Il nous faut écarter de ce débat l'argument tiré des nombreuses décisions où la femme mariée, nonobstant le fait qu'elle s'était obligée avec son mari, a été tenue responsable, lorsque l'obligation avait été contractée pour ses propres affaires ou, au moins, lorsqu'il a été démontré qu'elle en avait retiré le bénéfice. (*N.B.*—La plus notoire est celle de la Banque d'Hochelaga *v.* Jodoin, déjà citée.) Tous ces jugements peuvent s'expliquer par le motif que ces cas ne tombent vraiment pas sous l'article 1301 du code civil. Cet article défend à la femme de "s'obliger", et les codificateurs ne se sont pas expliqués sur le sens qu'ils donnaient à ce mot dans leur projet. Mais, d'autre part, il résulte du passage de leur rapport que nous avons reproduit plus haut qu'en employant le mot "obliger", ils n'ont pas entendu introduire à cet égard une innovation dans le code. Ils ont soin de déclarer que la seule "extension à la loi" dans leur projet est l'addition du mot "avec" aux mots "pour son mari". Or, il est conforme à l'histoire de cette législation, depuis le droit romain jusqu'aux statuts antérieurs au code, de comprendre, par l'expression "s'obliger" de l'article 1301 C.C., uniquement le cautionnement de la femme avec ou pour son mari... Il en résulte que l'obligation de la

(1) Q.R. (1913) R.L. (N.S.) 16.

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femme mariée pour ses propres affaires ou pour son propre compte, qu'elle soit ou non commune avec son mari, n'étant jamais, à proprement parler, un cautionnement de sa part, ne constitue pas un acte où elle "s'oblige" au sens de l'article 1301 C.C. et ne tombe pas sous le coup de cet article.

Le principe que l'engagement de la femme mariée n'est pas nul, bien qu'elle se soit obligée avec son mari, s'il apparaît qu'il a pour objet ses propres affaires, ou que la femme en a tiré profit, est de jurisprudence constante. Cependant, pour les raisons que nous venons d'en donner, ce principe ne saurait être considéré comme une exception à l'article 1301 C.C. introduite par les tribunaux. C'est plutôt, dans chacun de ces cas, une constatation que l'obligation n'est pas un cautionnement et que, ne l'étant pas, elle n'est pas couverte par l'article du code.

En plus, il est très important de se rappeler que l'article 1302 du code civil suppose le cas où le mari "s'oblige pour les affaires propres de sa femme", et fournit donc un exemple d'une obligation de la femme avec son mari, qui n'est pas entachée d'illégalité. Comme nous le fait observer monsieur le juge Monk dans Mailhot *v.* Brunelle (1870, 15 L.C.J. 197): "There is nothing in the law which prevents a wife from borrowing money. The mere circumstance of the husband being jointly and severally bound with the wife does not indicate that there is any illegality in the transaction. The wife cannot become security for her husband, except as "commune en biens"; but the husband may be jointly and severally bound with the wife where it is her debt.

Je suis d'avis que, dans ce passage, le Juge Monk a exprimé exactement la situation que nous avons à envisager ici.

Il s'agit, en effet, d'une dette exclusivement alimentaire. La somme que représente le billet sur lequel poursuit l'appelante est pour le logement et la nourriture, pendant deux ans, de l'intimée, ainsi que son mari et son enfant.

Déjà, comme l'établit abondamment le jugement de mon collègue, le Juge Kellock, l'obligation de l'intimée de payer cette somme est d'une nature contractuelle.

Mais, indépendamment de cette raison, c'est une erreur de dire que le mari est seul tenu de l'obligation alimentaire des époux et des enfants.

L'article 173 place le mari et la femme sur le même pied: "Les époux se doivent mutuellement fidélité, secours et assistance". C'est donc une obligation mutuelle. Et, antérieurement, l'article 165 du Code avait décrété: "Les époux contractent, par le seul fait du mariage, l'obligation de nourrir, entretenir et élever leurs enfants". Là, encore l'article ne dit pas le mari, mais "les époux".

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Il serait, je pense, extraordinaire qu'une femme et son enfant puissent se loger et se nourrir dans un hôtel, pendant deux ans, et que la femme réussisse à se soustraire à l'obligation de payer pour ces services.

Dès lors, même sans tenir compte du fait que, ainsi que le démontre dans ses notes de jugement mon collègue, le Juge Kellock, le montant que représente le billet, qui fait l'objet de l'action, a été la dette personnelle de l'intimée depuis le début, en vertu d'un contrat entre elle et l'appelante, il reste que c'était également sa dette en vertu du *Code*.

A vrai dire, par suite des négociations entre le mari de l'intimée et les autorités de l'appelante, l'on pourrait dire que l'intimée est responsable, même si son mari n'avait pas été son mandataire, parce qu'elle a donné tous les motifs raisonnables de croire qu'il l'était (C.C. 1730).

Déjà, en vertu de l'article 1317 du *Code Civil*, "La femme qui a obtenu la séparation de biens doit contribuer, proportionnellement à ses facultés, et à celles de son mari, tant aux frais du ménage qu'à ceux de l'éducation des enfants communs. Elle doit supporter entièrement ces frais s'il ne reste rien au mari". A l'article qui précède, l'on peut ajouter ce qui est décrété par l'article 1423 C.C. à l'effet que "chacun des époux contribue aux charges du mariage, suivant les conventions contenues en leur contrat, et s'il n'en existe point et que les parties ne puissent s'entendre à cet égard, le tribunal détermine la proportion contributoire de chacune d'elles, d'après leurs facultés et circonstances respectives".

Même dans le cas des enfants naturels, du moment qu'ils sont reconnus par le père ou la mère, l'article 240 C.C. leur donne le droit de réclamer des aliments contre chacun d'eux, suivant les circonstances.

Et il est important de constater que, de l'aveu même de l'intimée, même s'il s'agit d'une dette qui fait partie du passif de la communauté, cette dette est en même temps une dette personnelle à la femme, qu'elle avait tout autant que le mari le droit de contracter pour elle-même. Il n'y a jamais eu, que je sache, ni dans le *Code Civil* ni dans la jurisprudence de la province de Québec, un principe en vertu duquel la femme mariée n'aurati pas le droit de contracter une obligation pour ses affaires personnelles.

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Ce que la preuve démontrait ici, c'est que, non seulement le mari de l'intimée n'avait pas de revenus, mais qu'il était même insolvable. Dans ces circonstances, c'est sur la femme, qui avait des moyens, que l'obligation alimentaire retombait. Il n'y a pas à se demander si le logement et les aliments qu'elle a elle-même reçus à l'hôtel de l'appelante doivent être payés par elle; cela va de soi. Mais, en vertu de la loi, telle que nous venons de l'exposer, c'était également elle qui devait acquitter le logement et les aliments fournis tant à son mari insolvable qu'à son enfant.

Devant notre Cour, l'avocat de l'intimée a soulevé l'objection que la femme ne pouvait être tenue à l'obligation alimentaire, à moins qu'un jugement intervînt contre elle à cet effet. Je ne vois rien dans la loi qui exige cela. C'est la première fois que j'entends prétendre qu'une personne qui assume volontairement une dette n'est pas tenue de la payer avant d'y être condamnée par un jugement. Or, ici, dans les circonstances pécuniaires de son mari, l'intimée avait l'obligation naturelle de fournir les aliments et le logement à son époux, en vertu de l'article 173 C.C., et à sa fille, en vertu de l'article 165 C.C. En signant le billet qui fait l'objet de l'action elle a tout simplement acquitté volontairement cette obligation naturelle. Si elle avait payé en argent, on ne pourrait sûrement pas prétendre que ce paiement serait nul et sans effet, en vertu de l'article 1301 C.C., et qu'elle aurait droit à répétition. Ainsi que le dit l'article 1140 C.C.: "La répétition n'est pas admise à l'égard des obligations naturelles qui ont été volontairement acquittées".

En fait, l'obligation de l'intimée, en l'espèce, était plus qu'une obligation naturelle. C'est une obligation établie par la loi elle-même. C'est une obligation légale, à laquelle le *Code Civil* accorde un droit de poursuite contre celui qui doit des aliments, et, ici, cette obligation légale incombait à l'intimée tant pour elle-même que pour son mari et pour sa fille.

Il y a un jugement de la Cour de Cassation, rapporté dans la *Gazette du Palais,* 1935, Volume 2, p. 934, à l'effet que "chacun des père et mère, naturels comme légitimes, est tenu pour le tout de l'obligation de nourrir, entretenir et élever les enfants communs" et que, "cette obligation unique au regard des enfants qui en sont les créanciers en

dehors de toute décision judiciaire consacrant leurs droits, ne s'en divise pas moins entre les parents qui dans leurs rapports entre eux doivent en supporter le poids proportionnellement à leurs ressources... Toutefois, ajoute la Cour de Cassation, ledit recours (contre le parent défaillant) serait sans cause si à raison de son insolvabilité complète l'obligation de ce dernier se trouvait à disparaître".

Baudry Lacantinerie (3e éd. "Du Contrat de Mariage", volume 18, Tome 3, n° 1490, p. 50):

Chacun des époux est personnellement tenu de l'obligation de subvenir aux dépenses des enfants communs, et que les tiers ont, de ce chef, non pas seulement l'action de l'article 1166, mais une action directe contre la femme, aussi bien que contre le mari, quel que soit le régime matrimonial adopté... Les deux époux sont tenus solidairement envers ces tiers.

Au numéro 1493, p. 54, le même auteur ajoute:

Il résulte de l'article 1448, que les conjoints, le mari comme la femme contribueront aux charges du ménage proportionnellement à leurs ressources (cpr. art. 1537). Ceci posé, si l'on imagine que l'épouse ait pendant un certain temps, en cas de ruine, de son mari, soldé toutes les dépenses du ménage, puis, que ce dernier revienne à meilleure fortune, pourra-t-elle, non seulement profiter d'une réduction de sa contribution pour l'avenir, ce qui n'est pas douteux, mais encore exercer une répétition contre son époux? Il faut répondre non, du moins si elle n'a dépensé que ses revenus sans toucher à ses capitaux; car lorsque le mari n'avait rien, la femme, en acquittant avec ses revenus personnels toutes les dépenses du ménage y compris les frais d'éducation des enfants, a soldé sa propre dette. En une pareille occurrence, il n'y a place pour elle à aucune répétition.

Planiol & Ripert (Volume 8, n° 332, p. 374) se demandent si les créanciers peuvent poursuivre la femme en pareil cas. Ils répondent:

S'il s'agit d'une obligation alimentaire mise par la loi à la charge de la femme, on a affaire à une dette qui est à la fois commune et personnelle à la femme: celle-ci peut donc être poursuivie.

Et les mêmes auteurs, au volume 9, n° 1015, p. 437, expriment l'avis:

qu'il n'y a pas lieu à répartition des charges, quand l'un des époux ne possède rien et n'exerce aucune industrie lucrative. Cela est dit expressément par l'article 1448, al. 2: si le mari, après la séparation judiciaire, est sans ressource aucune, la femme doit supporter toutes les charges du ménage; mais la solution n'est pas spéciale au cas de séparation judiciaire. La femme doit alors payer même les dépenses personnelles du mari, et elle n'a aucune répétition à exercer contre celui-ci. Il en serait de même, dans la situation inverse, où ce serait la femme qui serait privée de ressources.

Il peut donc arriver que le mari ou la femme ait à supporter seul toutes les charges du mariage.

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Au titre des Personnes, Baudry-Lacantinerie (3e éd., volume 3, tome 3, nº 2001, p. 579) explique que l'obligation alimentaire naît en la personne de chacun des conjoints "de telle sorte qu'il soit permis d'exiger directement de chacun l'accomplissement de la portion qui lui incombe". Il ajoute:

> Il paraît donc incorrect de dire que la mère ne peut être actionnée que dans le cas d'insolvabilité du mari, puisqu'elle lui abandonne tout ou partie de ses revenus pour subvenir aux charges du mariage, parmi lesquelles figurent les frais d'éducation des enfants. En effet, les conventions matrimoniales peuvent bien régler la part contributoire des époux dans l'acquittement de cette obligation. Mais elles ne sauraient les soustraire aux poursuites personnelles auxquelles son inexécution les expose tous deux, sauf, s'il y a lieu, le recours de la femme contre son mari. Dès lors, par application de cette doctrine, les tiers doivent être admis, même durant la communauté, à réclamer le paiement de ces frais tant à la femme qu'au mari, mais pour une moitié seulement, si ce dernier est pleinement solvable.

Il s'ensuit que, si le mari est insolvable, c'est à la femme qu'incombe le paiement de ces frais et que les tiers sont admis à le réclamer d'elle seule.

Voir encore, dans le même sens, Dalloz (Jurisprudence Générale, 1890, première partie, pages 337, 338, 339 et 340); Baudry-Lacantinerie (Traité de Droit Civil, 3e éd.—Des Personnes—vol. 3, tome 3, De l'Obligation Alimentaire, pages 612, 617, 620, 625, 643, 672, 673, 674 et 892).

Et que la femme puisse être poursuivie seule dans un pareil cas ressort des jugements du Juge Lafontaine dans *Debien* v. *Dumoulin* (1), confirmé par la Cour de Revision, dont le rapport se trouve au même volume, p. 542; *de Montminy* v. *Paquet* (2); du Cours de Droit Civil Français, de Colin & Capitant (7e éd., vol. 3, p. 268); du Traité Pratique de Droit Civil Français, de MM. Planiol & Ripert (Vol. 8, tome 1er, nº 289, p. 334) où ces auteurs disent:

> La communauté n'est pas une personne morale mais une simple indivision: toute dette quelconque a nécessairement pour origine le fait personnel de l'un des époux, soit un fait antérieur au mariage, soit un fait postérieur au mariage, mais antérieur à sa dissolution. Or, alors même que la dette tombe en communauté et que pour ce motif, l'autre époux s'en trouve désormais tenu en sa qualité d'associé, celui du chef duquel la dette est née ne cesse pas d'en être débiteur pour le tout. D'où cette première règle: les créanciers de la communauté demeurent créanciers du mari ou de la femme et ont toujours pour gage, en plus des biens communs, les propres du mari ou de la femme. Les dettes de communauté ne cessent donc pas d'être des dettes personnelles.

(1) Q.R. 56 S.C. 271.

(2) Q.R. 69 S.C. 574.

Voir encore Louis Josserand, dans son ouvrage intitulé: "Cours de Droit Civil Positif Français", 2e éd., tome 3, p. 10 (n° 15) et p. 64 (n° 110).

Même dans la cause de *Trust and Loan Company of Canada* v. *Gauthier* (1) et avant l'amendement apporté à l'article 1301 C.C., pour protéger les créanciers qui ont contracté de bonne foi, Lord Lindlay (p. 100) rendant le jugement du Comité judiciaire du Conseil Privé, avait dit:

> She (la femme mariée) clearly does not infringe art. 1301 by simply disposing of her own property with his concurrence under art. 177. If this is done for her own benefit, the disposition is good.

L'intimée, en signant le billet en vertu duquel elle est maintenant poursuivie, ne s'est nullement portée caution pour son mari; elle a simplement reconnu son obligation naturelle et civile ou légale de pourvoir aux besoins de sa famille. S'il est vrai de dire que les prescriptions de l'artice 1301 sont d'ordre public, il l'est également de dire que, dans les circonstances de cette cause, l'obligation de l'intimée de fournir les aliments à son mari et à sa fille était d'ordre public.

Et, dès qu'on en arrive à la conclusion que la femme n'a fait rien autre chose que d'acquitter sa propre dette, il est strictement conforme à la jurisprudence de notre Cour, dans les différents jugements qui sont énumérés au début de mes notes, de dire que l'article 1301 C.C. ne fait pas obstacle au droit de l'appelante de réclamer le montant du billet.

Envisagée seulement comme une obligation naturelle à l'égard de l'intimée, sa dette était une considération suffisante pour le billet qu'elle a signé en faveur de l'appelante, ainsi que cette Cour l'a décidé dans l'affaire de *Hutchison* v. *The Royal Institution for the Advancement of Learning* (2) et dans *Pesant* v. *Pesant* (3).

J'ai voulu exposer aussi complètement que possible les vues que j'entretiens sur le droit absolu de l'appelante de recouvrer de l'intimée le montant du billet en cause. Mais, j'ajouterai que nous trouvons au dossier un argument qui, pour moi, est inéluctable et qui dispose de la prétendue objection à l'effet qu'avant que l'intimée puisse être tenue à la dette alimentaire vis-à-vis de son mari il eût fallu

(1) [1904] A.C. 94.
(2) [1932] S.C.R. 57.
(3) [1934] S.C.R. 249.

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qu'elle fût poursuivie et condamnée. Je tiens à répéter de nouveau que cette prétention est plutôt extraordinaire, vu que l'on ne poursuit quelqu'un que dans le cas où il ne consent pas volontairement à acquitter son obligation. Or, en l'espèce, le billet en date du 20 juin 1939, pour le paiement duquel l'appelante a poursuivi l'intimée, n'a fait que suivre et remplacer un autre billet consenti pour la même dette et pour les mêmes fins, le 19 mai 1934. Ce premier billet était au montant de $3,776.97. Le billet actuel est pour $3,026.97. Certains acomptes avaient été payés sur le premier billet et le second représente la balance.

Or, le fait capital, c'est que le billet du 19 mai 1934 est signé uniquement par l'intimée. Si l'appelante lui avait réclamé le montant de ce billet, l'intimée n'eut eu aucune base pour invoquer l'application de l'article 1301 et refuser de le payer. En donnant ce billet signé par elle seule, elle reconnaissait vis-à-vis de l'appelante, s'il en était besoin, son obligation personnelle d'acquitter les créances alimentaires de l'appelante contre elle, pour elle-même, pour son mari et pour sa fille. Elle a donc reconnu la dette et il s'ensuit qu'en donnant, même avec son mari, le billet du 20 juin 1939, non seulement elle ne s'est pas obligée avec ou pour son mari, suivant les exigences de l'article 1301 C.C., mais, au contraire, elle n'a fait qu'acquitter sa dette personnelle; c'est plutôt son mari qui s'est obligé "pour les affaires propres de sa femme", pour employer les termes mêmes de l'article 1302 du Code Civil.

Mais, toutes ces raisons ne viennent que s'ajouter à celles déjà exprimées par mon collègue, le Juge Kellock, et, comme lui, pour ces différents motifs, de même que ceux exposés par M. le Juge St-Germain, dans son opinion dissidente en Cour du Banc du Roi, je maintiendrais l'appel ainsi que l'action de l'appelante contre l'intimée, avec dépens dans toutes les Cours.

TASCHEREAU, J.:—L'intimée et son époux, John Thomas Kelly, ainsi que leur jeune fille Kathleen, ont habité l'hôtel Place Viger à Montréal, propriété de l'appelante, depuis le 24 avril 1932 jusqu'au 19 mai 1934. Le compte hebdomadaire était payé de façon très irrégulière, aussi, M. et Mme Kelly ont-ils dû consentir plusieurs billets promissoires en reconnaissance de la créance de l'appelante, dont le montant n'est pas contesté.

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Le 25 novembre 1933, un premier billet a été signé par Mme Kelly, et endossé par M. Kelly, pour une somme de $3,742.79, et comme à la date de leur départ de l'hôtel, il était encore en souffrance, il fut renouvelé. Mme Kelly signa alors un nouveau billet, endossé par son mari, mais cette fois pour $3,776.97, la créance ayant augmenté de $34.18. Le 20 janvier 1939, après que deux acomptes de $375.00 chacun, soit $750.00, furent versés, un dernier billet fut consenti au montant de $3,026.97, signé conjointement et solidairement par M. et Mme Kelly, et c'est ce billet qui fait la base de la présente action. M. le Juge en chef Tyndale de la Cour Supérieure a accueilli cette réclamation contre M. Kelly, mais l'a rejetée quant à son épouse, et la Cour d'Appel (1), avec la dissidence de M. le Juge St-Germain, a confirmé ce jugement. Comme Kelly n'a pas appelé en Cour d'Appel, ni devant cette Cour, il se trouve à y avoir chose jugée quant à lui.

Étant mariée sous le régime de la communauté, l'intimée prétend que cette dette a été contractée personnellement par son mari, que c'est une dette de la communauté, pour laquelle sa responsabilité n'est pas engagée, et que c'est en violation des dispositions de l'article 1301 C.C. qui lui défend de *s'obliger pour ou avec son mari,* qu'elle a signé ce billet dont on lui réclame maintenant le paiement.

D'autre part, l'appelante soutient que le crédit a été accordé à l'intimée, riche héritière de feu Hugh Quinlan, que sa responsabilité personnelle est engagée, même s'il s'agit d'une dette de la communauté; et qu'à tout événement, l'intimée en signant ce billet n'a fait que reconnaître l'obligation légale de fournir à son mari, incapable de se les procurer, et à sa fille mineure, les aliments nécessaires à la vie. Dans l'alternative, s'il ne s'agit que d'une obligation naturelle, celle-ci aurait été convertie en obligation civile, susceptible de justifier la présente action, par la signature du billet qu'elle a consenti avec son mari. Que l'obligation soit *ex lege* ou *naturelle,* l'article 1301 C.C. ne trouverait pas son application.

Il est nécessaire en premier lieu de déterminer qui a contracté cette dette vis-à-vis de l'appelante. A la lecture des témoignages de M. et Mme Kelly, des employés de la Compagnie Cashman, Derouville et Cooper, il me semble

(1) Q.R. [1950] K.B. 79.

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qu'on ne peut entretenir de doute que c'est bien M. Kelly lui-même qui a fait avec l'hôtel, les négociations préliminaires et les arrangements définitifs pour lui et sa famille. C'est d'ailleurs la conclusion à laquelle est arrivé le juge au procès, confirmée par la majorité des juges de la Cour d'Appel. M. le Juge en chef Tyndale s'exprime ainsi:

> The Court can find nothing in the evidence to show even an implied contract with Mrs. Kelly. Consequently, the Court reaches the conclusion that Mrs. Kelly could not be held liable *ex contractu.*

M. le Juge en chef Létourneau, avec qui a concouru M. le Juge Casey, dit:

> Joignons à cela que la demanderesse-appelante n'a nullement établi que cette dette représente le billet, base de l'action, fût en fait celle de la défenderesse-intimée. L'ensemble de la preuve est à l'effet que ni quant à un engagement, ni même quant à un crédit, l'appelante n'a eu affaires à l'intimée. Tout, à ce sujet, s'est transigé avec le mari.

Enfin, M. le Juge Gagné est non moins explicite sur ce point:

> Il ne faut pas oublier, cependant, que dans ce cas-ci, la dette contractée envers l'appelante l'a été par le mari seul, sans aucune participation de l'épouse.

Les représentations que le défendeur Kelly a pu faire sur la situation financière de son épouse, les possibilités futures d'un substantiel héritage provenant de la succession Quinlan qu'il a sans doute fait miroiter, ont peut-être induit l'appelante, non pas à ouvrir le crédit, mais à le prolonger. Mais tout cela ne peut lier l'intimée qui est demeurée étrangère aux négociations, et n'a pas eu pour effet de créer entre elle et l'appelante des relations contractuelles entraînant sa responsabilité personnelle.

Il résulte de cette détermination de faits, amplement justifiée par la preuve, que la dette originaire était la dette du mari, et ainsi la dette de la communauté, dont il est le chef, et l'unique administrateur. (C.C. 1292.) Que cette dette soit la dette de la communauté, ne peut faire de doute, devant le texte précis du Code (C.C. 1280, para. 5), qui est à l'effet que les aliments des époux, l'éducation et l'entretien des enfants font partie du *passif de la communauté.* Delorimier (Droit Civil, Vol. 2, page 129—Citation de Pothier) (Laurent, Vol. 3, n° 4, Principe de Droit Civil) (*Gregory & Odell* (1)), (Fuzier & Herman, Code Civil Annoté, Vol. 1, page 276) (C.C. 1371). Ce n'est qu'à

(1) Q.R. 39 S.C. 289.

la dissolution de cette communauté, que l'épouse supportera sa part, mais si elle y renonce, elle n'aura aucune responsabilité. Même dans le cas d'acceptation, elle ne sera tenue des dettes de la communauté que jusqu'à concurrence des bénéfices qu'elle en retire, s'il y a eu un fidèle inventaire, et si elle a rendu compte de ce qu'elle a reçu. (C.C. 13701374.) *Vide*: *Proulx* v. *La Caisse Populaire de Rimouski* (1). Quand les parties sont mariées sous un autre régime alors ce sont les articles 1317 et 1423 C.C. qui déterminent leurs obligations respectives. (Fuzier & Herman, Code Civil Annoté, Tome 1, 1935, art. 203.)

Il se présente certes des cas où une femme commune en biens peut être poursuivie conjointement avec son mari, mais il faut alors distinguer entre les dettes dont il s'agit. Si la dette est une dette personnelle de la femme, et est également devenue une dette de la communauté, elle pourra être poursuivie personnellement; mais si au contraire la dette ne lui est pas personnelle, mais est uniquement une dette commune, le mari, maître de la communauté, seul pourra être poursuivi.

La doctrine est bien exposée par M. le Magistrat en chef Ferdinand Roy, dans la cause de *Montminy* v. *Paquet* (2), où il décide que la femme:

a) peut être défenderesse, s'il s'agit d'une dette qui lui est personnelle, tout en étant aussi une dette de communauté;

b) qu'elle ne peut être poursuivie seule, *puisqu'elle ne peut pas même l'être avec son mari,* s'il s'agit d'une dette exclusivement de communauté.

Dans *Hudon* v. *Marceau* (3), la Cour d'Appel avait antérieurement décidé:

1. That a wife, "commune en biens", who purchases necessaries for the family of her husband and herself, only binds the community and in no way binds herself personally, unless she afterwards accepts the community, and then only to the extent of one half, or (where there is an inventory) to the extent she may have profited by the community.

C'est aussi la doctrine des auteurs français. Ainsi, Baudry-Lacantinerie (Courtois & Surville) 3e éd., "Du contrat de mariage", Vol. 1, page 439, n° 499:

Nous verrons plus tard sur quels biens les tiers peuvent recouvrer ce qui leur est dû par le mari, et comment tout créancier du mari a action tant sur les biens de l'époux que sur les biens communs. N'insistons ici que sur ce seul point, à savoir que les créanciers pour dépenses du ménage n'ont pas d'action sur les biens de la femme.

(1) Q.R. (1940) 69 K.B. 359. (2) Q.R. 69 S.C. 561.
(3) Q.R. 23 L.C.J. 45.

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Pothier, "Traité de la Communauté", Vol. 7, n° 574, page 301:

> A l'égard des dettes auxquelles la femme ne s'est pas obligée en son nom, la femme et ses héritiers n'en sont pas tenus, même envers le créancier, quand même ce seraient des dettes dont il pourrait sembler que la femme a profité; telles que sont celles du boulanger, du boucher, du marchand qui a vendu les étoffes dont elle s'est habillée. Denisart rapporte un arrêt du 22 juillet 1762, qui a donné à une veuve qui avait renoncé à la communauté, congé de la demande du boucher, pour fourniture de viande jusqu'à la mort de son mari, en infirmant une sentence du Châtelet qui avait fait droit sur la demade. (Denisart, verbo "renonciation de la communauté", N° 26.)

La doctrine et la jurisprudence sont même allées plus loin, et il est aujourd'hui unanimement admis que même si la femme agit personnellement, et achète les nécessités de la vie pour les besoins du ménage, elle est considérée comme mandataire de son mari, et ne peut être tenue personnellement responsable. C'est une dette de la communauté pour laquelle seul le mari pourra être recherché. Cette doctrine a été admise dans la cause de *Hudon* v. *Marceau* (*supra*), et c'est aussi ce qu'enseigne Fuzier-Herman, Vol. 12, "Communauté conjugale", n° 941:

> Au lieu d'être exprès le mandat de la femme peut, disons-nous, n'être que tacite. La théorie du mandat tacite, admis par la plupart de nos anciens auteurs, est également acceptée aujourd'hui par la jurisprudence et la doctrine. Le principe du mandat tacite s'applique notamment, *aux obligations contractées par la femme pour subvenir aux besoins du ménage.* Ainsi la femme est censée avoir reçu mandat de son mari pour l'achat des aliments et autres fournitures du ménage, les linges et vêtements. Par suite les dettes contractées pour l'acquisition de ces divers objets *doivent être acquittées par le mari et la communauté sans que la femme en soit tenue elle-même.*

Laurent, (Vol. 21, n° 430, page 493) exprime ses vues de la façon suivante:

> Lorsqu'au contraire la femme contracte comme mandataire du mari, elle ne s'oblige pas personnellement, c'est le mandat qui s'oblige; c'est donc le mari qui est débiteur et par conséquent, la dette comme dette du mari, devient dette de la communauté, *sans que le créancier ait action contre la femme,* car les dettes de la communauté ne sont pas dettes de la femme; celle-ci n'est tenue que pour sa part quand elle accepte la communauté, *non comme débitrice personnelle,—elle ne l'a jamais été,—mais comme femme commune.*

Dans le cas qui nous occupe, il s'agit clairement d'une dette de la communauté, pour laquelle seul le mari peut être tenu. Il en est responsable "ex contractu" vis-à-vis l'appelante, et il le serait également si c'eut été sa femme

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agissant comme son mandataire, qui l'eut contractée. Il s'agit d'une nécessité de la vie dont la femme commune n'est pas responsable, même si elle en a profité.

Les obligations du ménage sont tellement la responsabilité de la communauté, qu'en vertu de l'article 1311 C.C., la femme peut demander la séparation de biens, lorsqu'elle est forcée de voir seule ou avec ses enfants aux besoins de la famille. En outre, lorsqu'en 1931 la Législature de Québec a amendé le Code Civil pour donner une plus grande protection aux biens réservés de la femme mariée, il a été stipulé que les créanciers de la communauté pourraient poursuivre le paiement de leurs créances sur ces biens réservés, mais seulement pour les dettes du ménage. Il est évident que cette disposition a été introduite dans la loi, parce que les dettes du ménage sont une dette de la communauté, et que par suite de la nouvelle législation, la communauté étant appauvrie jusqu'à concurrence du montant des biens réservés, ceux-ci devaient garantir les dettes de la masse, comme s'ils en faisaient encore partie. Il est bon de remarquer cependant, que cette législation ne s'applique qu'aux biens réservés, c'est-à-dire au produit du travail personnel de la femme, et non aux propres de l'épouse qui se sont jamais entrés dans la communauté. (1425 (*c*) C.C.)

Le billet signé conjointement et solidairement par les deux défendeurs n'est qu'une reconnaissance de cette dette, et n'a pas opéré de novation. En le signant, à la demande de son mari, Mme Kelly s'est "obligée pour ou avec son mari" pour une dette de ce dernier, et comme le constate une jurisprudence uniforme, son acte est frappé de nullité absolue, comme étant une violation de l'article 1301 C.C. qui est d'ordre public. Cet article 1301 se lit ainsi:

> La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, (sauf les droits des créanciers qui contractent de bonne foi).

Sur ce point, on pourra référer aux causes suivantes: *Lebel* v. *Bradin* (1); *Hamel* v. *Panet* (2); *Trust & Loan* v. *Gauthier* (3); *Joubert* v. *Turcotte* (4); *Laframboise* v. *Valières* (5); *Rodriguez* v. *Dostie* (6); *Poulin et Carette* v.

(1) Q.R. 19 R.L. (N.S.) 16.
(2) 2 A.C. 121.
(3) [1904] A.C. 94.
(4) Q.R. 51 S.C. 152.
(5) [1927] S.C.R. 193.
(6) [1927] S.C.R. 563.

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Banque Canadienne Nationale (1); *Audette* v. *Banque Canadienne Nationale* (2); *Daoust Lalonde* v. *Ferland* (3), enfin, à la cause de *Larocque* v. *Equitable Life Ins. Co.* (4), où le Très Honorable Juge en chef T. Rinfret a fait une complète revue de la jurisprudence dans la province de Québec.

L'article 1374 est à l'effet que la femme qui, pendant la communauté, s'oblige avec son mari, même solidairement, est censée ne le faire *qu'en qualité de commune;* en acceptant, elle n'est tenue personnellement que pour moitié de la dette ainsi contractée, et ne l'est aucunement si elle renonce. Le résultat de ces deux articles combinés, (1301 et 1374 C.C.), est que, si la femme est séparée de biens, elle ne peut jamais s'obliger *avec son mari,* sauf pour ses affaires personnelles, mais si elle ne l'est pas, elle ne peut *s'engager qu'en qualité de commune,* c'est-à-dire que, lors de la dissolution de la communauté, elle sera responsable pour la moitié de la dette de la communauté, et ne le sera pas si elle y renonce. Dans l'intervalle, avant que ne s'ouvre la communauté, c'est-à-dire avant sa dissolution, date où naîtront ses droits et ses obligations, selon qu'elle acceptera ou refusera, elle ne peut être poursuivie, car ce n'est pas elle qui a lié la communauté. *Elle n'en a pas le droit.*

Mais l'appelante prétend que l'article 1301 ne s'applique pas lorsque la femme s'oblige avec son mari comme conséquence d'une dette "ex lege", ou d'une obligation naturelle, à la merci de la conscience du débiteur, mais qui se transforme en obligation civile, par la signature d'un billet promissoire qui a l'effet de nover la dette. Pour appuyer cette théorie ingénieuse sans doute, l'appelante cite les articles suivants du *Code Civil*:

165. Les époux contractent, par le seul fait du mariage, l'obligation de nourrir, entretenir et élever leurs enfants.

173. Les époux se doivent mutuellement fidélité, secours et assistance.

Dans son factum, elle reproduit la définition que donnent Aubry & Rau (Vol. 4, Cours de Droit Civil Français, page 5) de l'obligation naturelle:

On définit assez ordinairement les obligations naturelles en disant que ce sont celles qui dérivent de l'équité ou de la conscience, ou bien encore celles qu'imposet la délicatesse ou l'honneur.

(1) [1931] S.C.R. 33.
(2) [1931] S.C.R. 293.
(3) [1932] S.C.R. 343.
(4) [1942] S.C.R. 205.

On a cité la cause de *Pesant* v. *Pesant* (1), pour établir qu'une obligation naturelle peut servir de considération valide à un billet promissoire. Cette proposition évidemment ne saurait laisser de doute dans l'esprit. Mais ce qui a été dit dans cette cause, ne peut aider à déterminer la présente, où c'est un tiers qui réclame.

Il est possible et même très probable qu'en certains cas, une dette qui résulte de la loi, ou qu'une dette naturelle, qui est devenue une dette civile, puisse être l'objet d'une obligation conjointe du mari et de la femme *vis-à-vis un créancier,* sans qu'intervienne l'article 1301 C.C., pour la déclarer nulle quant à la femme. Mais il n'est pas nécessaire de considérer cette question car nous ne sommes pas en présence d'un débiteur vis-à-vis un créancier, *à qui serait due l'obligation légale ou naturelle* mais bien en présence d'un tiers qui voudrait bénéficier personnellement des relations légales ou naturelles qui existent entre le mari et la femme, et la mère et sa fille, et qui découlent des articles 165 et 173 C.C.

J'entretiens des doutes sérieux sur les droits que peuvent avoir les tiers d'invoquer à leur profit les articles 165 et 173 C.C. Ces articles me paraissent plutôt déterminer les relations entre époux et entre les père et mère et leurs enfants. C'est d'ailleurs ce que la Cour d'Appel de la province de Québec a décidé. Ainsi, parlant pour la majorité de la Cour, Sir A. A. Dorion a dit dans *Bruneau* v. *Barnes et vir* (2):

> Quant aux articles 165 et 173 du Code Civil, ils n'ont rien à faire à la question qui nous occupe.
>
> Ces articles ont été placés dans les chapitres du Code qui traitent du mariage et des conventions matrimoniales pour régler les droits des conjoints entre eux, et non pour déterminer les droits que les tiers pourraient avoir contre eux.
>
> Les époux se doivent mutuellement secours et assistance, mais les tiers n'ont pas d'action pour obliger un époux à secourir l'autre, de même qu'ils n'ont pas d'action pour forcer la femme à supporter seule toutes les dépenses de la famille lors même que le mari n'aurait rien.
>
> Entre les époux et les enfants, il y a des obligations légales réciproques déterminées par les articles du Code, mais entre les époux et les tiers il n'y a que celles qui résultent des conventions d'après les règles exposées au traité des obligations.

(1) [1934] S.C.R. 249.

(2) Q.R. 25 L.C.J. 245.

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D'autre part, dans une cause de *Fecteau* v. *Brousseau* (1), la Cour d'Appel a décidé qu'un tiers peut réclamer contre le père ou la mère d'un enfant quand il a accompli l'obligation de ces derniers. C'est parce qu'on a reconnu que ce tiers agissait en qualité de "negotiorum gestor" en pourvoyant à l'éducation d'un enfant mineur aux lieu et place de son père. Mais tel n'est pas le cas qui nous est soumis, car il n'apparaît nulle part que l'appelante ait volontairement assumé la gestion d'affaires de monsieur ou de madame Kelly sans la connaissance de ces derniers. (C.C. 1043). Aucun quasi-contrat n'est intervenu entre les parties et l'appelante n'a pas été non plus la mandataire de l'intimée, ce qui aurait peut-être donné lieu à une action de mandat.

Même en admettant, ce qui ne me paraît pas probable, que les articles 165 et 173 du Code Civil confèrent des droits aux tiers, encore faudrait-il que ces derniers soient dans les conditions nécessaires pour pouvoir réclamer. Ils ne peuvent évidemment pas avoir plus de droits que ceux en faveur de qui sont édictés ces articles 165 et 173. Par analogie, on peut citer l'article 1031 du *Code Civil* qui, en certains cas, permet à un tiers d'exercer les droits et actions de son débiteur. Mais semblable action n'est ouverte à un tiers que s'il peut démontrer que son débiteur a négligé ou refusé d'exercer son recours. Comme le dit justement M. le Juge MacKinnon, parlant pour la majorité de la Cour d'Appel, dans la cause de *Harris* v. *Royal Victoria Hospital* (2):

> I consider that the plaintiff, by its action as drawn, can get no comfort from these articles. It is clear that under article 1031 C.C. a creditor in order to avail himself of the rights and action of his debtor can only do so when to his prejudice *the debtor neglects or refuses to do so.* There is no allegation that defendant's mother-in-law has ever been put in default to exercise any claim she might have against her son-in-law or that she has neglected or refused to do so.

Il me semblerait étrange qu'il appartînt à l'appelante dans l'espèce de faire déclarer que le mari et la jeune fille ont droit de réclamer des aliments de l'intimée (condition essentielle à la réussite de la présente action), quand ceux-ci leur ont été fournis par Kelly lui-même, qui en est personnellement responsable et contre qui jugement a été obtenu. Comme le dit d'ailleurs mon collègue M. le Juge Fauteux,

(1) Q.R. 49 K.B. 211. (2) Q.R. [1948] K.B. 30.

il n'est pas démontré que Kelly aurait eu le droit de réclamer des taliments de son épouse, et rien n'indique qu'elle ait négligé ou refusé de lui en fournir, ou qu'il fut incapable de travailler. L'inactivité n'a jamais donné ouverture à une réclamation pour pension alimentaire.

Il est bon, je crois, de signaler le danger qu'il y a dans la présente cause, de s'inspirer des auteurs et des arrêts des tribunaux français pour déterminer les droits respectifs des parties. En effet, en France, l'article 1301 C.C. n'existe pas, et bien des opinions ont été exprimées qui sans doute ne l'auraient pas été, si en France, il était défendu à la femme de s'obliger pour ou avec son mari.

Pour résumer, je suis d'opinion que la dette originaire a été contractée par le mari, qu'elle était en conséquence une dette de la communauté, pour laquelle seul le mari pouvait être poursuivi, et que quand l'intimée a signé le billet promissoire dont on lui réclame le paiement, elle s'est, en reconnaissant cette dette, "obligée pour ou avec son mari", en violation de l'article 1301 C.C. S'il fallait admettre la théorie de l'appelante, qu'en souscrivant ce billet, Mme Kelly remplissait une obligation "ex lege" ou naturelle qu'elle devait à son époux, et qu'elle en est responsable vis-à-vis la demanderesse, ce serait permettre à celle-ci d'exercer indirectement un recours que la loi lui dénie. Ce serait en outre conférer à des tiers plus de droits contre l'un des époux que ceux-ci n'en ont l'un vis-à-vis de l'autre. L'article 1301 C.C. a été incorporé dans notre Code pour que le mari ne profite pas de son autorité, et dissipe ainsi les propres de son épouse, en exigeant d'elle la garantie de ses dettes. Cette législation serait illusoire, et la protection accordée à la femme inefficace, si la présente action devait être maintenue.

Pour toutes ces raisons, je crois que l'appel doit être rejeté avec dépens.

KELLOCK, J. (dissenting):—The pertinent facts out of which this appeal arises are extremely simple.

The respondent, her husband and daughter, registered at the appellant's hotel in Montreal on April 24, 1932, the husband having previously telephoned with reference to the accommodation. A cheque of the respondent for $163.86, in payment of the account for the first week, which,

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like all accounts, was made out to the three who had signed the hotel register, was returned n.s.f. on May 13. The attention of Mr. Hooper, the appellant company's auditor, was drawn to the matter, and on his instructions one of his subordinates, Griffith, telephoned the respondent and asked her for payment of the cheque. Griffih's evidence, which was accepted by the learned trial judge, is as follows:—

Q. And what did she say?—A. She simply said that it would be a matter of days before it would be taken care of.

Q. She said that, did she?—A. Yes, she said give *her* time and the cheque would be mailed.

Hooper himself testified that shortly after his attention had been drawn to the non-payment of the cheque, respondent's husband came in to see him, and the following occurred:—

—A. And he told me that Mrs. Kelly was a daughter of the late Hugh Quinlan, and he proved to me that it was a very wealthy estate, and on the strength of this I allowed credit to Mrs. Kelly, but not to Mr. Kelly.

Q. Did he speak to you about the Robertson case?—A. Yes, he told me about the Robertson case. He said it was before the Court, and might be decided at any time, and which meant a great amount of money if they won, and they fully expected to win.

Q. Did he speak to you about his own personal affairs? Did he give any reason why he could not pay the hotel bill?—A. Well, Mr. Kelly told me he had been working in the Robertson case; that he had no occupation, that he had no assets, and that he had practically nothing. He gave me to understand that the account, if it was ever paid, would be paid by Mrs. Kelly.

Q. Did he mention the fact that he owed money also?—A. He told me he had some accounts—I will not say that he told me, at that time, the names of the people he owed the accounts to, but it was mostly in Westmount, about $5,000.00. I think it was at that time.

This evidence is also accepted by the learned trial judge, who finds with respect to the evidence of the husband, who was called for the respondent, that

Kelly admitted in substance his interview with Hooper as recounted by the latter, and that the community between Mrs. Kelly and himself had had no assets since 1931.

The learned judge further finds that Kelly had "no prospects" and "might almost be considered therefore as bankrupt."

In that state of affairs, the only means of the husband and wife from the day they first entered the hotel consisted of the interest of the respondent in the estate of her father,

the late Hugh Quinlan. By the terms of the will of the latter, this interest was excluded from the community of property subsisting between the respondent and her husband.

When the family took up residence at the hotel, the respondent was in receipt of a monthly income from the estate of $166, but she was entitled, on the death of her mother, which took place in fact in the following October, to a much larger income, and in addition to that, it was confidently hoped, as stated by Kelly in his interview with Hooper, that the litigation then proceeding between the estate and Robertson, who had been a partner of the testator in large undertakings, would produce a substantial increase in the assets of the estate and hence a corresponding increase in the income of the respondent. As the maintenance of the family at the hotel averaged in the neighbourhood of $465 per month, it is evident that the hotel, in allowing the family to remain, was extending credit on the basis not only of the respondent's actual income but of its increase. On the death of the respondent's mother on October 8, 1932, the income of the respondent increased to $6,500 in 1933 and $7,575 in 1934. The litigation with Robertson continued throughout the period.

In these circumstances, the first question which arises is the question as to whom credit was given. Hooper said, as above mentioned, that on the strength of his interview with Kelly, he had "allowed credit to Mrs. Kelly but not to Mr. Kelly," and that "after what he told me himself I could not possibly allow him any credit." No doubt this is not "evidence," but I think, with respect, it merely states the only rational conclusion to which any ordinary business man would have come in such circumstances.

On the day they entered the hotel, husband and wife knew what the husband stated to Hooper, namely, that if the hotel "was ever paid (it) would be paid by Mrs. Kelly." That being so, as honest people they must be taken to have themselves intended that it was the wife to whom credit would be given and by whom the liability would be incurred, and that the husband in his dealings with the hotel throughout was nothing but her mandatory. No doubt the hotel, not knowing the real situation when the family first arrived, would have been entitled to look to

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the husband, but the respondent was also liable; Article 1716. When the real situation was, however, disclosed to the appellant, the respondent alone became responsible; Article 1715. That the respondent fully understood the position is confirmed by the very first act which occurred with reference to the account, namely, her act in giving her cheque in payment followed by her request to Griffith for time to pay, and her promise to pay.

It is provided by s. 407 (3) of the *Criminal Code* that

> Every person is guilty of an offence... who fraudulently obtains food, lodging or other accommodation at any hotel...; and proof that a person obtained food, lodging or other accommodation at any hotel... and did not pay therefor and... knowingly made any false statement to obtain credit or time for payment, or offered any worthless cheque in payment... shall be *prima facie* evidence of fraud.

It is not to be presumed that either the respondent or her husband, when they entered the hotel, intended to defraud, or that the respondent, in what she said to Griffith, was stating other than her true intent. Nor is it to be presumed that Kelly, in stating to Hooper that if the appellant were to be paid at all it would not be by him but by the respondent, was stating other than a fact well understood by both him and his wife.

When, therefore, the account having been allowed to run into a substantial figure on the strength of these facts, the respondent made the note of November 25, 1933, in favour of the appellant and her husband endorsed it, this again fully confirms the position as well understood by all concerned, namely, that she was the debtor, her husband being merely her surety, for whatever that might be worth.

I am therefore, with respect, in this very plain situation, unable to accept or understand the finding of the learned trial judge, concurred in, as it was, by the majority in the Court of Appeal (1), that there is

> nothing in the evidence to show even an implied contract with Mrs. Kelly.

In my view, St. Germain J., in his dissenting judgment, accurately assesses the position as follows:—

> Si maintenant nous référons à la preuve, voici certains autres faits qui nous permettent de déduire que dans toutes les relations du mari de la défenderesse avec la compagnie relativement à la fourniture du logement et de la pension par ladite compagnie, tant au défendeur lui-même

(1) Q.R. [1950] K.B. 79.

qu'à la défenderesse et à leur fille Kathleen, le défendeur a agi comme mandataire de son épouse, et ce à la connaissance et du consentement au moins tacite de la défenderesse.

On May 19, 1934, a new note was taken, again signed by the actual debtor, the respondent, as maker, and again endorsed by Kelly as surety. On June 20, 1939, some payments having been in the meantime made, a new note was taken. This was signed by the respondent and Kelly jointly, but there is no evidence and no suggestion on the part of anyone that the previously existing relation between the parties was to be changed. It is well settled, of course, that the relationship as between joint makers of a promissory note may be shown to be that of principal debtor and surety; *Greenough* v. *McClelland* (1). The respondent in the present case remained the principal debtor and the husband the surety.

There is further express evidence that the respondent clearly understood the arrangement which had been made on her behalf by her husband as mandatary for her. At the time of the signing of the last note mentioned above, which is the note sued on, Griffith, who was present, testifies that on that occasion Kelly told him in the respondent's presence that

when the money that was expected to accrue to Mrs. Kelly from the Quinlan estate would come, we could expect payment of our account.

This is the clearest corroboration of her recognition of her husband as her mandatary in his previous dealing with Mr. Hooper, and that she herself was the debtor.

In the present case, in my view, the learned trial judge and the Court of Appeal have not only failed to draw the proper inferences from the facts proved, but appear either to have overlooked completely or failed to give due weight to the evidence which I have set out above. Both courts appear to have stopped in their appraisal of the evidence at the mere fact that it was the husband who made the original reservations and his hand that made physical delivery of cheques or cash to the hotel. One would expect he would at least do that much, but that cannot determine with whom the hotel contracted once the real facts were disclosed to it.

(1) 2 El. & El. 424.

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The present is one of those cases, in my view, which "turn on inferences from facts which are not in doubt," to use the language of Lord Wright in *Powell* v. *Streathan Manor* (1). Lord Wright added:

> in all such cases the Appellate Court is in as good a position to decide as the trial judge.

I am satisfied, with respect, that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses is not sufficient either to explain or justify his conclusion as above. In my opinion, it unmistakably appears from the evidence to which I have referred, that he has not taken proper advantage of his having seen and heard the witnesses. The matter is therefore at large; *Watt. Thomas* (2), per Lord Thankerton at 587.

I do not wish to part with the facts without refering to the disingenuous evidence of the respondent in her endeavour to put forward the pretence that everything done by her husband was completely detached from herself, while she, as she said, "hoped he would pay" the hotel.

When called as a witness on her own behalf, the following rather leading question was put to her. I give her answer and some of what followed:—

> Q. Mrs. Kelly, have you been able to save any money out of your houseekeping allowance?—A. No.
>
> Q. Have you saved any money out of your personal earnings?—A. No, I have never had any personal earnings.

Subsequently, when put on the stand by the appellant, she said:—

> Q. Mr. Cotton has asked you whether you have saved any money from your housekeeping allowance. Did you ever have any housekeeping allowance from your husband?—A. Yes.
>
> Q. When was that?—A. I cannot remember.
>
> Q. Was that during the last few years?—A. No.
>
> Q. When would that be? Would you say, roughly, it would be ten years ago?—A. I really cannot remember.
>
> . . . . . .
>
> Q. Did your husband give you any personal allowance when you were living at the Place Viger Hotel?—A. Yes, he often gave me money.
>
> Q. How much did he give you?—A. I do not know; he did not give me any special allowance.
>
> Q. You do not remember whether he gave you five or ten dollars per month?—A. I cannot remember.
>
> Q. Would it be about that?—A. He did not give me any special amount.

(1) [1935] A.C. 243 at 267. (2) [1947] 1 A.E. 582.

Q. You had no regular monthly allowance from your husband?—A. No.

. . . . . .

Q. You said that your husband gave you an allowance?—A. I did not say that he gave me an allowance, I said that he often gave me money.

Q. Do you know whether that money was out of your own cheques which you gave him in blank?—A. I really never asked him.

Q. It might have been?—A. I do not know. I did not ask him.

As to the suggestion that she entertained any idea that her husband could pay, I quote the respondent as follows:—

Q. Where did you expect your husband to get the money to pay off the notes if you knew that he had judgments outstanding against him?—A. Do I have to answer that question?

Mr. COTTON: I will object to that question.

The COURT: I will allow the question.

A. Well, as far as I know, he always said he would have the money; I do not remember him telling me where he was going to get it.

Mr. PRÉVOST: You hoped that he was going to get it somewhere, some way?—A. He told me he would get it.

The COURT: Did he tell you where he would get it?—A. No, he did not.

Mr. PRÉVOST: You do not know, or you did not know where your husband was working, or how much he was earning?—A. No, I did not.

. . . . . .

Q. Did you know that your husband, at the time, had judgments against him?—A. Yes.

Q. You knew that?—A. Yes.

With evidence of this character the courts are very familiar. Such evidence admits what it is intended to deny. It should not deceive anybody, nor distract attention from the conclusion with which the really significant facts are pregnant. I agree fully with the view of St. Germain J. as to the respondent's evidence when he said:—

Les réticences dans les réponses données par la défenderesse aux questions qui lui sont posées démontrent, à mon humble avis, une entière mauvaise foi de sa part.

Before considering the result in law, it is necessary to refer to certain other evidence given by the husband. The record of the account shows that on November 2, 1932, the sum of $2,000 was paid to the hotel, and on June 30 and July 31, 1934, payments of $375 each were also made. When called as a witness for the respondent, Kelly claimed that these sums had been paid out of his own funds. Although he admitted that he had had no bank account, he claimed that he had deposited moneys of his own in the account

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of his wife and that, from time to time, she gave him cheques on that account signed by her in blank.

On being cross-examined as to this story, Kelly stated that in 1932 he had received $10,000 from the Northern Construction Company which he said he had earned in connection with the negotiating for that company of a construction contract, and that he had borrowed an additional $5,000 by way of discount of a note which a friend had given to him.

He testified as follows:—

Q. And when you went to the Place Viger Hotel in April 1932, you had severed your connection with the firm you spoke of, the Northern Construction Company?—A. I never was working or associated with them; I just negotiated this one contract.

. . . . . .

Q. Now, referring to that $10,000.00. When you arrived at the hotel, in April 1932, did you still have that money?—A. No, I had not received it all, I had received some of it previously, in fact I received some more while I was at the hotel. As to the exact amount I would have to check that up, but I think that I received $7,000.00, and then I received $3,000.00 previous to that. At the time I would say that I had approximately $7,000.00.

This answer is not entirely unambiguous, but it is at least plain that the alleged negotiation of contract by which the money was said to have been earned, had taken place prior to the time the family went to the hotel on April 24, 1932. If this story be, for the moment, taken at face value, what is said is that on April 24, Kelly was in funds to the extent of some thousands of dollars. He himself, however, furnishes the refutation, in that he also deposed that during this same period he had no bank account of his own but had used that of his wife. The evidence with respect to this account is in the record and it discloses that on May 7, when the respondent gave her first cheque to the hotel in the sum of $163.86, there were not sufficient funds in the account to meet it. Comment would appear to be unnecessary. Further, Kelly's story is completely contradicted by his statement to Hooper, which the learned judge accepts as representing his true position at the time, namely, that he had "no assets" and "no prospects".

In stating, therefore, that Kelly's evidence at trial with respect to these alleged funds was uncontradicted, the learned judge overlooked this direct contradiction of Kelly himself and his own finding. Kelly himself did not attempt

an explanation. If it be a fact that Kelly was able subsequently to induce a friend to give him a note which Kelly was able to discount, that is quite irrelevant to the issues here in question, as no such possibility entered into the considerations placed before Mr. Hooper when the appellant agreed to give credit.

It is a fact that $2,000 was paid on the account on November 2, 1932. As already observed, the respondent's mother had died on October 8 previously, resulting in a large increase in the income to be received by the respondent. This fact may not be unconnected with the ability of the husband to induce a friend to lend the money, but however that may be, all of this is completely irrelevant, in my view, with respect to the question as to the person with whom the hotel contracted in the previous May, for all of it was quite unknown to the hotel and was not even in "prospect" so far as Kelly himself was concerned. The same applies to the two payments of $375 each in June and July, 1934. Accordingly, I do not pursue the subject further. The fact that the appellant took judgment against Kelly contributes nothing to the discussion. He became liable as surety on the very first note, as already pointed out.

The defence put forward on behalf of the respondent and given effect to below was that, being common with her husband as to property, the liability for maintenance of husband and family is thrown once and for all by Article 1280 (5) upon the community, and that by reason of Article 1301, the respondent was unable to contract the debt here in question. The argument is that the liability placed upon a married woman by Articles 165 and 173 is satisfied under all circumstances in the case of a married woman common as to property, by the mere fact of the community itself, regardless of the fact as to whether or not the community or the husband have any assets, or whether or not the wife herself has assets. If sound, it would follow from this proposition that in the case of a husband and wife common as to property, even if the former be insolvent while the latter has substantial assets, the wife is under no legal obligation to provide for either her husband or children. It is said that the only alternative to starvation so far as the position at law is concerned is that the

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husband, if able-bodied, can go to work at some employment. What the children are to do in the meantime the argument does not say. Such a contention would seem to require careful consideration.

By Article 165, husband and wife come under an obligation, by the mere fact of marriage, to maintain their children. By Article 169, however, maintenance is only granted in proportion to the needs of the party claiming and the means of the parent, while Article 170 makes it clear that if the parent has no means he is discharged from all liability to maintain. It is further provided by Article 173 that husband and wife owe each other mutual succour and assistance, and Article 175 obliges the husband to supply his wife with all necessaries of life "according to his means and condition."

So far as these Articles are concerned, it would seem to follow, from their plain language, that where a husband has no means and, accordingly, in the words of Article 1311 (3), "the wife is forced to provide alone... for the wants of the family" in fact, she has also the sole legal obligation to do so. For myself, I see no ground upon which one is to be driven to the view that this obligation, placed upon all married women, is to be taken as satisfied from the day of her marriage, in the case of a woman common as to property, by mere reason of the fact that Article 1280 (5) includes maintenance of the family among the liabilities of the community.

Articles 165 and 173 are not, in terms, limited to regimes other than the regime of community, and to construe 1280 (5) in the way above suggested would be to introduce an exception into these Articles which the legislature has not placed there. In my opinion, no such limitation is to be read into either of these Articles, and that being so, it cannot be said that a married woman common as to property, who finds herself, to use again the language of Article 1311 (3), "forced to provide...for the wants of the family," is precluded by the terms of Article 1301 from carrying out her obligation in the only way which, at times, may be open to her, namely, by pledging her credit. In view of the co-existence in the Code of all these Articles, the provisions of Article 1301 are to be limited to cases where a wife incurs an obligation not already binding in law upon her.

With respect, the contrary view accepts, without looking farther, such statements as that in Dalloz, Répertoire Pratique, Vol. 8, para. 736, where, in commenting on Article 203 C.N. which corresponds to Article 165 of the Civil Code, the author says:—

> Elle doit être acquittée par le mari sous le régime de communauté; ...elle est acquittée dans la proportion fixée par la loi...

This paragraph, however, is immediately followed by para. 737 which reads as follows:—

> Si l'un des époux est dans l'impossibilité de satisfaire à cette charge, ou ne peut y satisfaire que partiellement, elle incombe à l'autre intégralement ou dans la mesure où son conjoint ne peut la supporter.

Among the authorities referred to in support of the last mentioned paragraph is the judgment of the Cour de Cassation of the 21st of May, 1890, reported in Dalloz, Jurisprudence Générale 1890, p. 337, which also reproduces the comment upon the judgment by M. de Loynes of the Faculty of Law of Bordeaux.

The case referred to was that of a claim by a third person for the maintenance of a child of the defendant husband and wife, common as to property. It was there held that the obligation created by Article 203 was a liability of each of the spouses and that the third party had an action even during the community against the wife as well as against the husband.

In his comment upon this judgment, M. de Loynes says at p. 338:—

> Il est même un cas dans lequel, comme nous venons de le rappeler, l'un des époux doit supporter toute la dette, et, par conséquent, être condamné pour le tout, c'est lorsque l'autre époux est insolvable. Alors la dette se transforme; elle cesse d'être une dette conjointe; il n'y a plus qu'un seul débiteur.

In *Gibeau* v. *Varin* (1), it was held again by the Cour de Cassation that the obligation to maintain their children rests upon both parents. If one has discharged more than his proper share, the other must contribute, except in the case of the insolvency of the latter. As there stated,

> Attendu... qu'il suit de là que, si l'un d'eux s'est soustrait à l'exécution de ce devoir à la fois légal et moral, vis-à-vis des enfants hors d'état de se protéger eux-mêmes, celui qui en a forcément assumé la charge a, en principe, un recours contre le défaillant;

(1) *Gazette du Palais*, Vol. 2, p. 934.

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Attendu toutefois que ledit recours serait sans cause si, à raison de son insolvabilité complète, l'obligation de ce dernier se trouvait à disparaître;

According to these authorities, there is no basis for reading into Article 165 any exception in the case of a married woman common as to property. If the community and the husband have no assets, but the wife has, she is liable, just as in the case of a woman separate as to property, for the entire maintenance of the children. In such circumstances, the obligation of the husband has disappeared, not only with respect to the maintenance of the children, but also with respect to that of the wife, this latter liability of the husband being conditioned upon his means; Article 175. The wife also becomes liable for the entire support of the husband; Article 173.

Accordingly, in my opinion, Article 1301 can have nothing to say in the case of an obligation placed upon the wife by other sections of the Code, and must be limited, as I have already pointed out, to cases where she is under no such liability. As pointed out by their Lordships in *Gauthier's* case (1), the object of Article 1301 is to protect a wife against her husband and herself. It can have no application, therefore, where she is contracting for the purpose of carrying out an obligation which the law itself has already placed upon her. It is obvious that one of the ordinary ways in which a married woman, or anyone else, could carry out such an obligation would be by the pledge of her credit.

The authorities cited above further show that a married woman common as to property is, in the circumstances described, liable to an action at the suit of third parties. If that be so, there is all the more reason for saying that she may contract for the maintenance for which she may in any event be sued, not only by her husband and children, but also by third parties. Articles 1031 and 1043 recognize that third parties have a right of action whether or not they have also the right to sue directly under Articles 165 and 173. It matters not that in the case at bar the action is not founded on either of these Articles. The point is that the *Code* itself recognizes that a liability exists.

(1) [1904] A.C. 94 at 101.

The view of the Court of Queen's Bench in *Bruneau* v. *Barnes* (1), with respect to the right of action of creditors under Articles 165 and 173, would appear to be out of harmony with the authorities to which I have referred and was given without any discussion of the authorities. It appears also to take no account of other provisions of the *Code* such as Articles 1031 and 1043. The actual decision has no application to the case at bar, as the debt in the case was purely a debt of the husband alone.

Where the liability of the husband has disappeared, a wife, in contracting for food and lodging for herself and family is not binding herself either "with" her husband or "for" him. In truth she is simply dealing with her own property for her own responsibility. In a case such as the case at bar, where, owing to lack of means on the part of a husband, the wife is thrown upon her own resources, she is free to provide for herself as she sees fit and to pledge her children also, she keeps them with her and in so doing goes beyond that which could be demanded of her in the way of provision if she were being sued by them, this is again a matter of her own responsibility. The husband being without means and, therefore, having no liability towards wife or children, her contracts in connection with the maintenance of herself and children are matters to which Article 1301, even upon its litteral terms, cannot apply.

Where the husband is in need, the wife is bound to succour him, and where that obligation exists, Article 1301 can have no application to contracts entered into by her in furtherance of an obligation placed upon her by the *Code* itself. She is certainly entitled, if husband and wife so desire, to provide for him in the same establishment which she has set up for herself and their common children. In this connection it is to be remembered that the measure of the liability under consideration, once the need is established, is the means of the person liable. As pointed out in Planiol & Ripert, Tome 2, édition 1925, "Traité Pratique de Droit Civil Français", p. 31,

un changement dans la situation de fortune du débiteur pourra avoir pour conséquence de faire mettre la pension à un taux supérieur...

(1) Q.R. 25 L.C.J. 245 at 246.

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It is clear on the authorities, also, that mere physical capacity on the part of the husband to do some kind of work does not affect the matter.

In dealing with Article 208 (C.C. 169) which provides that maintenance is only granted "dans la proportion du besoin" of the person claiming, Planiol & Ripert, in the volume to which I have just referred, state at p. 25 that the need of a person ought to be appraised according to the income of such person, whatever its origin, rather than on the basis of the value of his property. They go on to say that an individual who can provide for himself by working, has no claim for support, although he has no property, and that it is not even necessary that such profitable employment be exercised in fact if its exercise be "possible". The exact statement of the authors is as follows:—

> Le besoin d'une personne doit être apprécié d'après les revenus qu'elle a, quelle qu'en soit l'origine, et non d'après la valeur de ses biens. Un individu qui peut se procurer de quoi vivre en travaillant n'a pas droit à des aliments, quoiqu'il n'ait pas de biens; il n'est pas même nécessaire que cette profession lucrative soit exercée en fait, il suffit que son exercice soit possible.

In support of the text, the authors refer in the first place to a judgment of the Cour de Cassation of the 7th of July, 1863, Dalloz, Jurisprudence Générale 1.400. In that case, the Paris court had refused the claim of a son against his father and mother for maintenance, it appearing that the main cause for the position of want in which the son found himself was his "instabilité dans les divers emplois qu'il a occupés, ses habitudes de désordre et d'oisiveté, sa répugnance à s'employer utilement pour lui-même". This decision was upheld by the Cour de Cassation on the same grounds.

The authors also refer to the judgment of one of the Cours Impériales of the 15th of December, 1852, reported in Dalloz, Jurisprudence Générale, 1853, 2.88, where a similar claim was rejected on the ground that the claimant was in a position to provide for himself by carrying on his former employment if he were so minded.

It is clear, therefore, from the above that where a claimant is in a position to maintain himself by his own efforts but for some fault of his own, he may not enforce a claim for maintenance. Planiol & Ripert, in the same paragraph, go on to say that, conversely, an individual,

although in possession of substantial property but from which he receives no income, is still entitled to maintenance, and that the person obliged to provide such maintenance cannot avoid his obligation by saying that the claimant should sell his property and thereby provide himself with revenue. The authors add the significant sentence that "le besoin du créancier consiste dans le manque actuel de revenus. Il faut toutefois qu'il n'y ait dans ce cas aucune faute à ne pas aliéner les biens improductifs".

It has not been shown in the case at bar that the husband's lack of means was in any way due to fault on his part. Nothing of the kind was argued on behalf of the respondent who, in maintaining her husband in the common ménage with herself and her children, lived up to her legal obligation to him and, at the same time, kept the family circle unbroken.

To my mind, the suggestion that Article 1301 is to be construed as prohibiting contracts by a wife for such purpose, and that she is under legal obligation, whatever her means, to force her husband to the street so long as he is able, from the physical standpoint, to do some kinds of work, is something which, with respect, I cannot think the provincial law, with its regard for family life, ever contemplated. In any event, I find nothing in the Article in question which compels such a view. On the contrary, I think the relevant provisions of the *Code* taken as a whole, as well as the authorities to which I have referred, dictate a contrary conclusion. In such case as that here under consideration, the wife is acting neither with nor for her husband, but for her own responsibility.

In *Moha* v. *Genis* (1), it was held that a married woman, common as to property, was liable for the rent of an apartment which had been demised to the husband, he having thereafter become insolvent and left his wife. The court held that it made no difference that the wife had not entered into the lease and therefore was not liable in contract. The landlord could sue her under the provisions of Article 203.

In a learned comment on this judgment, M. Raynaud of the Faculty of Law of Toulouse criticizes the judgment on the ground that as the husband was no longer living in

(1) (1944-45) Sirey, 2.57.

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the apartment with his wife but had established a separate abode of his own, there could be no liability on the part of the wife to the husband under Article 203, as he had no need. Had the consorts been living together, however, the learned author would have considered the judgment correct.

M. Raynaud, in his commentary, deals with the effect of Articles 203 and 212 (165 and 173 C.C.) both as between the spouses themselves as well as with regard to third parties. He denies that a wife, common as to property, is forever acquitted of her liability toward her husband and her children by the mere fact of community where, as in the case at bar, she has personal assets. He says:—

Nul ne pourrait raisonnablement soutenir qu'une femme ayant des biens personnels importants soit en droit de laisser périr de faim un mari insolvable, sous prétexte qu'elle s'est acquittée de sa contribution. Lorsque celle-ci s'avère pratiquement insuffisante ou que le régime matrimonial ne fonctionne pas, par exemple par suite de la séparation de fait des époux, l'obligation alimentaire entre époux, qui revêt la forme du devoir de secours, reparaît parce qu'elle n'est pas remplie. Si le contrat de mariage peut aménager à la guise de ses auteurs la contribution des conjoints aux charges de la vie du foyer, il ne saurait dispenser un des époux de l'obligation de secours qui est certainement d'ordre public ni en diminuer l'intensité. Il se peut que la femme ait rempli complètement le devoir que lui impose le régime matrimonial de participer aux frais du ménage, cela ne signifie pas nécessairement qu'elle en est quitte avec le devoir de secours.

L'obligation alimentaire peut donc ne pas être satisfaite par le jeu du régime matrimonial qui normalement envisage et assure son exécution par la contribution des époux aux charges communes, les articles 203 et 212 ont alors une occasion de s'appliquer directement pour assurer l'accomplissement du devoir de secours.

The truth is that the obligation cast upon the community by Article 1280 (5) does not exhaust the liability of the wife, there being always in the background the liability created by Articles 165 and 173 so that where neither the community nor the husband has any assets, but the wife has, she must support the family on the footing of these Articles.

In concluding that the creditors themselves as well as the children and the husband may prefer a claim directly against the wife under Articles 203 and 212 (165 and 173 C.C.), M. Raynaud summarizes his conclusions as follows:

En résumant ce que nous venons de dire nous pourrons apprécier notre arrêt. En cas d'insolvabilité du mari ses créanciers peuvent poursuivre directement la femme séparée de biens dans la mesure de la part contributive de celle-ci, lorsqu'ils se prévalent d'une dette ménagère; ils peuvent aussi réclamer paiement à la femme, quel que soit le régime

matrimonial adopté, dans la mesure de la dette alimentaire de celle-ci, à condition que la fourniture ait un caractère non seulement ménager, mais alimentaire. Dans l'espèce, c'est sur ce dernier terrain seulement que pouvait se rechercher une justification de la condamnation de la femme.

The view to which I have come was earlier expressed by Boyer J. in an earlier phase of this litigation reported in 79 K.B. 121. That learned judge, after referring to *Gauthier's* case, said at p. 122:—

La dette encourue pour la subsistance du mari et de la femme et de leur enfant est bien une dette de la communauté, mais d'après l'art. 173 C.C., les époux se doivent assistance mutuelle et ils sont tous deux tenus à nourrir et entretenir leurs enfants d'après l'art. 165 C.C., et lorsque le mari est sans moyens et ne gagne rien et que l'épouse a les moyens d'y subvenir et c'est le cas ici, cette obligation lui est personnelle et elle peut s'engager avec le concours de son mari, art. 177 C.C., comme elle l'a fait dans les circonstances.

On a cité différents arrêts de part et d'autres rendus presque tous avant l'amendement et pour la plupart des jugements d'espèce, mais il ne s'agit pas d'appliquer strictement la lettre de la loi, il faut aussi en considérer l'esprit et le but.

Le but, dans ce cas, est de protéger la femme qui, en général, ne connaît point les affaires et subit trop facilement l'influence du mari, même au point de sacrifier ses intérêts.

Or, l'appliquer à la lettre dans l'espèce, ne bénéficierait pas à la femme, mais lui nuirait en l'empêchant d'obtenir les choses nécessaires à la vie. Car alors personne ne voudrait la nourrir et loger par crainte de n'être pas payé ou de se voir réclamer la pension déjà payée.

D'ailleurs, dans l'espèce, ce n'est pas la femme qui s'est engagée avec son mari, mais le mari qui s'est engagée avec sa femme, car aucun crédit n'aurait été accordé au mari et rien n'empêche le mari de s'engager pour ou avec sa femme.

Au surplus, la demanderesse, non seulement, était de bonne foi, mais le logement et la nourriture ont été fournis à la défenderesse elle-même et à ceux pour lesquelles elle était responsable.

Accordingly, as I have said, Article 1301, in my view, has no application in such a case as the present where the respondent was, in the circumstances, bound in law to provide for her family.

I have not overlooked that part of the account which was for guests. All items of this character were authorized by the husband, who told the appellant's employee that "we" would be responsible. This the appellant accepted. Such items were all incurred after May 1932, and I think that on the evidence to which I have referred, the appellant was entitled to rely on the husband as having the authority from his wife which he purported to have and which she recognized in the manner I have already indicated.

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In the foregoing I have not specifically referred to authorities cited by the respondent in support of the contention put forward on her behalf that the consideration for the original note was solely a liability of the community for which the respondent was not personally responsible.

In his factum, counsel for the respondent cites from Baudry-Lacantinerie (Courtois & Surville) 3rd edition, "Du contrat de mariage", Vol. 1, p. 439, as follows:—

> Nous verrons plus tard sur quels biens les tiers peuvent recouvrer ce qui leur est dû par le mari, et comment tout créancier du mari a action tant sur les biens de l'époux que sur les biens communs. N'insistons ici que sur ce seul point, à savoir que les créanciers pour dépenses du ménage n'ont pas d'action sur les biens de la femme.

The authors are, however, speaking here only of the liability imposed on the community by Article 1409 (5) C.N., 1280 (5) C.C., and are not dealing with the case of insolvency of one of the spouses. The situation, of course, is quite clear where that element is not present. In Baudry-Lacantinerie (Houques-Fourcade) "Droit Civil", Vol. 3, p. 577, Article 1997, where the authors are dealing with the obligation with respect to the education of the children, it is stated:—

> Quant aux parents légitimes, ces frais constituent une des charges du mariage. Elle doit, comme telle, être acquittée conformément aux stipulations des conventions matrimoniales, c'est-à-dire par la communauté sous le régime de la communauté légale (art. 1409-5)..... Mais ces frais retombent toujours à la charge d'un des époux dans toute la mesure où l'autre ne peut pas les supporter, quelles que soient sur ce point les dispositions de leur contrat de mariage.
>
> 2001. Mais, si l'obligation n'est ni solidaire, ni même *in solidum*, du moins naît-elle en la personne de chacun des conjoints, de telle sorte qu'il soit permis d'exiger directement de chacun l'accomplissement de la portion qui lui incombe. Il paraît donc incorrect de dire que la mère ne peut être actionnée que dans le cas d'insolvabilité du mari, puisqu'elle lui abandonne tout ou partie de ses revenus pour subvenir aux charges du mariage, parmi lesquelles figurent les frais d'éducation des enfants. En effet, les conventions matrimoniales peuvent bien régler la part, contributoire des époux dans l'acquittement de cette obligation. Mais elles ne sauraient les soustraire aux poursuites personnelles auxquelles son inexécution les expose tous deux, sauf, s'il y a lieu, le recours de la femme contre son mari. Dès lors, par application de cette doctrine, les tiers doivent être admis, même durant la communauté, à réclamer le paiement de ces frais tant à la femme qu'au mari, mais pour une moitié seulement, si ce dernier est pleinement solvable.

The respondent also quotes from Planiol & Ripert, Vol. 8, p. 374, No. 332 last part, as follows:—

S'il s'agit du contraire de l'entretien de la femme qui incombe personnellement au mari (art. 214 C.N., 175 C.C.) ou les dépenses du ménage, on admet en général que les dettes contractées par la femme ne peuvent être poursuivies contre elle, la femme agit comme mandataire du mari.

It will be observed that the authors state the above to be true "in general." Earlier in the same paragraph they had already said:—

Les charges du mariage étant une dette de la communauté, les créanciers ont certainement une action contre celle-ci et, par conséquent, contre le mari (292). Peuvent-ils également poursuivre la femme? Il faut distinguer.

S'il s'agit d'une obligation alimentaire mise par la loi à la charge de la femme, on a affaire à une dette qui est à la fois commune et personnelle à la femme: celle-ci peut donc être poursuivie. Il en est ainsi des aliments dus aux enfants communs (art. 203),.....

The respondent further quotes from Dalloz, Jurisprudence Générale, No. 2545, as follows:—

Les aliments fournis à la communauté et dont la femme a profité donnent-ils une action contre elle en cas l'insolvabilité du mari? Non, selon la doctrine des anciens auteurs.

This paragraph is, however, under the heading, "Des effets de la renonciation à la communauté". Article 1494 C.N., 1382 C.C., deals with that situation and provides that the wife who renounces is released from all contribution to the debts of the community, except that

she remains liable towards the creditors when... the debt which has become a community debt was one for which she was originally liable.

As I have already pointed out, the obligation for maintenance of the family is thrown by Articles 165 and 173 entirely on the wife where the husband is insolvent, and is therefore a debt "for which she was originally liable" or "attributable to herself", to use the language of the *Criminal Code*. Dalloz, in Répertoire Pratique, Vol. 8, para. 737, which I have cited earlier in this judgment, deals expressly with the situation which exists in the case at bar.

I would allow the appeal with costs throughout, and direct the entry of judgment in favour of the appellant for the sum of $3,026.97 and interest from June 23, 1940.

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CARTWRIGHT, J.:—For the reasons given by my brothers Taschereau and Fauteux, I agree with the conclusion at which they have arrived and I wish to add only a few words.

After a perusal of the complete record I find myself quite unable to say that the findings of fact made by the learned Chief Justice at the trial, concurred in as they have been by the Court of Appeal, should be set aside. Particularly I can not find in the evidence support for the view that at any stage of the dealings between the officials of the appellant and Mr. and Mrs. Kelly it was agreed that the respondent should become the principal debtor of the appellant in place of her husband. On the contrary, as my brother Fauteux points out, the appellant always retained Kelly as its debtor. It received payments from him personally from time to time as indeed it pleads in paragraph 5 of its "Answer to Amended Plea of Female Defendant" and it has taken judgment against him.

I am equally unable to say that the evidence would justify a finding that Kelly was entirely without means during the period that he and his family stayed at the Place Viger Hotel. The uncontradicted evidence, which appears to have been accepted in both courts below, is that during this period he received payment of moneys due him of $7,000 and borrowed a further $5,000.

I would dismiss the appeal with costs.

FAUTEUX, J.:—En avril 1932, et à la suite d'une entente intervenue entre le mari de l'intimée et l'un des officiers de l'appelante, propriétaire de l'hôtel Viger, à Montréal, les époux Kelly établissaient, à toutes fins, à cet endroit, leur foyer familial. Suivant l'usage, la demande de paiement des frais encourus pour chambres, pension, et autres services, était faite chaque semaine, par la remise du compte hebdomadaire aux Kelly. Mais le défaut d'y satisfaire régulièrement força éventuellement les époux à s'y engager par billets. Et c'est ainsi qu'au cours et par suite de cette résidence à l'hôtel de l'appelante pendant une période de vingt-cinq mois, fut créée la dette au paiement de laquelle les époux Kelly se sont engagés conjointement et solidairement par le billet produit au soutien de l'action. Ce billet fut donné en renouvellement de billets antérieurs signés

par l'intimée, endossés par son mari et remis à l'appelante tant au cours qu'après la fin du séjour des Kelly à l'hôtel.

L'action contre le mari a été maintenue par jugement de la Cour Supérieure; lequel est, depuis lors, passé en force de chose jugée.

L'intimée, pour sa part, invoquant qu'elle était mariée sous le régime de la communauté légale de biens—ainsi qu'elle est d'ailleurs décrite au bref d'assignation—, plaida avec succès devant la Cour Supérieure, aussi bien que devant la Cour d'Appel (1)—seul, M. le Juge St-Germain étant dissident—la nullité des engagements pris par elle et ce, en vertu des dispositions de l'article 1301 du *Code Civil*. L'appel devant cette Cour est de ce dernier jugement.

L'article 1301 prescrit:

> La femme ne peut s'obliger avec ou pour son mari, qu'en qualité de commune; toute obligation qu'elle contracte ainsi en autre qualité est nulle et sans effet, (sauf les droits des créanciers qui contractent de bonne foi).

Il ne peut faire aucun doute que la dette contractée envers l'appelante représente une charge du mariage. Comme telle, elle fait partie du passif de la communauté (1280, para. 5) et devient, en principe, mais sujet à ce qui suit quant à l'obligation de la payer, pour moitié à la charge de chacun des époux (1369).

De par la loi, et à l'égard de l'appelante, l'époux de l'intimée y est tenu pour la totalité, sauf son recours contre sa femme au cas d'acceptation de la communauté (1371). Kelly a, d'ailleurs, ainsi que déjà indiqué, été condamné à la payer intégralement.

De par la loi également, à l'égard de l'appelante aussi bien qu'à l'égard de son mari, l'intimée n'est tenue de la payer que si elle accepte la communauté (1370).

De plus, et même au cas d'acceptation, la responsabiilté de la femme, édictée aux deux articles ci-dessus, n'est, sujet à l'accomplissement des conditions prescrites, engagée que dans la mesure y indiquée.

Aucun des faits, mentionnés en l'article 1310, susceptibles de provoquer la dissolution de la communauté n'étant survenu, l'occasion, pour l'intimée, d'accepter cette communauté ou d'y renoncer, ne s'est jusqu'à date encore jamais

(1) Q.R. [1950] K.B. 79.

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présentée. Conséquemment, l'obligation de l'intimée à l'égard de l'appelante, aussi bien qu'à l'égard de son mari, n'est pas encore née. Son existence future reste aléatoire.

Qu'elle ait personnellement, mais pour partie seulement, profité des services qui ont donné lieu à cette dette, la chose est certaine. C'est là, cependant, un avantage que la loi, à raison du régime matrimonial sous lequel elle s'est mariée, lui assurait déjà tout en déniant contre ses propres, le recours des tiers aussi bien que celui de son mari, recours devenu par la loi, dans son principe et sa mesure, assujetti aux conditions ci-dessus indiquées. Les biens du débiteur sont le gage du créancier. C'est là un principe d'élémentaire justice sanctionné par le texte même de la loi (1981). Mais le débiteur, en l'espèce, n'est pas encore la femme; c'est la communauté, c'est le mari. Et, à l'actif de cette communauté, la femme, on peut le rappeler, apporte déjà sa contribution. La loi désigne ceux de ses biens qui entrent dans cette communauté pour répondre du passif (1272), comme elle indique ceux qui en sont exclus—ses propres—(1275 et s.)—pour protéger la femme contre les abus possibles de la maîtrise absolue et exclusive accordée au mari sur les biens de cette communauté (1292).

De ce chef, l'action de l'appelante contre l'intimée ne saurait être maintenue puisque, de par la loi même, elle n'est pas encore tenue de payer et qu'il reste, en fait, problématique de savoir si elle le sera jamais. (*Hudon et al* v. *Marceau* (1); *Bruneau et vir et Barnes et vir* (2); *Globensky* v. *Boucher* (3); *Proulx et vir* v. *Caisse Populaire de Rimouski* (4).

Mais les arguments suivants avancés par l'appelante doivent être considérés.

On prétend d'abord que l'intimée s'est engagée personnellement vis-à-vis l'appelante—i.e., qu'elle a engagé ses propres—à supporter cette charge du mariage, et, que ce soit la dette à venir ou passée en résultant, elle serait liée ainsi *ex contractu*.

Il est avéré qu'à l'origine, c'est le mari, le chef de la communauté, qui fit l'entente avec l'appelante. Nulle part apparaît-il en preuve que, subséquemment, un contrat soit intervenu de façon expresse entre l'intimée et l'appelante.

(1) Q.R. 23 L.C.J. 45.
(2) Q.R. 25 L.C.J. 245.
(3) Q.R. 10 K.B. 321.
(4) Q.R. 69 K.B. 359.

Et le savant Juge de première instance, aussi bien que les Juges de la majorité de la Cour d'Appel, n'ont pu déduire de tous les faits prouvés en cette cause, aucun tel contrat, même implicite. Sur ce point, il y a donc concurrence de vues des deux Cours inférieures.

Il est manifeste, cependant, que les représentations faites à l'appelante par le mari—subséquemment à l'arrangement intervenu entre eux et postérieurement à l'apparition des appréhensions de l'appelante sur le paiement de ses services—sur les expectatives financières de l'intimée, ont contribué à assurer aux Kelly le prolongement de leur séjour à l'hôtel et la continuation des avantages qu'ils en ont retirés. Quoi qu'il en soit de cette circonstance ou des autres, en l'espèce, pouvant avoir une portée sur cette question, et assumant qu'on en puisse déduire que l'intimée aurait, subséquemment et pour les raisons ci-dessus, implicitement consenti à s'engager—i.e., à engager ses propres—à l'endroit de l'appelante, pour le paiement de cette charge du mariage—que ce soit la dette future ou passée en découlant, peu importe—, la véritable question est de savoir si, en prenant tel engagement dans les circonstances de cette cause, soit pour avoir du crédit pour l'avenir ou payer la dette existante, l'intimée s'est obligée avec ou pour son mari autrement qu'en qualité de commune et ce, en violation de la prohibition contenue en l'article 1301.

Il faut bien observer d'abord que même si, en fait, tel engagement fut pris par l'intimée, son époux n'a pas été, pour cela, libéré à l'endroit de l'appelante, de l'obligation qu'il avait, dès l'origine, en fonction de la même charge ou de la même dette, de par la loi, aussi bien que par contrat. Nulle part en la preuve pouvons-nous retrouver l'intention de l'appelante de l'en décharger. A la vérité, et bien au contraire, cette dernière n'a jamais renoncé à ses droits et recours contre lui, mais a constamment recherché et obtenu sa signature, aussi bien que celle de sa femme, sur les billets qu'elle exigeait. Et elle a obtenu jugement contre lui. De sorte qu'à l'endroit de l'appelante,—aussi bien, d'ailleurs qu'*ex lege* à l'endroit de l'intimée—, Kelly, débiteur de l'obligation à l'origine, l'est toujours demeuré et ce, *ex contractu* aussi bien qu'*ex lege.*

Et voilà bien un facteur juridique d'importance à la détermination de l'applicabilité ou non de l'article 1301.

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En vérité, cette Cour, dans *Rodrigue et Dostie* (1), réaffirmait, à la page 570, le principe suivant:

> La Cour du Banc du Roi et le Conseil Privé, dans la cause de Trust & Loan *v.* Gauthier, ont établi que la règle d'ordre public contenue dans l'article 1301 C.C. ne saurait être frustrée d'une manière indirecte et que, quels que soient les moyens détournés employés pour l'éluder, dès que les faits viendront à la connaissance du tribunal, il annulera toute obligation contractée directement ou indirectement par la femme en violation de cet article. C'est un principe que cette cour a elle-même affirmé dans la cause de Klock *v.* Chamberlin. En pareille matière, l'enquête du juge ne saurait être limitée par les énonciations du contrat, ni se laisser arrêter par les expressions contenues dans les actes. Au delà des termes, il recherchera si la convention ne constitue pas une violation déguisée.

Et, à la page 571 du même rapport:

> Quelles que soient les voies indirectes qui sont employées pour obtenir l'obligation de la femme mariée, la nullité d'ordre public édictée par l'article 1301 C.C. doit recevoir tout son effet du moment qu'il est démontré d'une façon satisfaisante que les parties contractantes ont cherché à enfreindre la loi.

Conséquemment, il importe peu que l'intimée, co-signataire avec son mari du billet produit au soutien de l'action, ait été précédemment seule signataire de ce billet alors que son mari en était l'endosseur. La méthode adoptée ou les formes suivies pour engager, pour l'avenir, la responsabilité de l'intimée à satisfaire avec ses propres une dette qui n'était pas la sienne, quel qu'ait été, à cet égard, l'accord de volonté de toutes les parties concernées, ne peuvent entrer en considération si on a, de cette façon, fait indirectement ce que la loi défend de faire directement. On ne peut davantage prétendre corriger la position en suggérant que ces billets signés par elle et endossés par son mari, ou le billet où les deux sont cosignataires, aient opéré novation et modifié les rapports juridiques des parties. La novation suppose la validité de la dette novée et ne peut, de toutes façons, servir à couvrir une nullité d'ordre public si telle nullité frappait déjà l'obligation initiale.

Or, dans *Trust and Loan Company of Canada* v. *Gauthier* (2), le Comité judiciaire du Conseil privé déclarait, à la page 100:

> The language of art. 1301 renders it necessary to distinguish between obligations of a wife for her husband and other obligations contracted by her. The object of the article is evidently to protect her against her husband and against herself. *Except in dealing with their common property, she is not to bind herself with him, i.e., she is not to join him in any obligation which affects him.* But she clearly does not infringe

(1) [1927] S.C.R. 563.

(2) [1904] A.C. 94.

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art. 1301 by simply disposing of her own property with his concurrence under art. 177. If this is done for her own benefit, the disposition is good. *If, however, she disposes of it for her husband, she immediately falls within art. 1301.* What then is meant by "for him"? Does it mean jointly with him, or as his surety and nothing more? or does it mean for him generally, i.e., in any way for his benefit?.....

La réponse à ces questions apparaît à la page 101:

But their Lordships gather from the decisions referred to in the argument and in the published commentaries on the Code Civil that the words "for her husband" are now judicially held to mean *generally in any way for his purposes as distinguished from those of his wife;*

Il ne paraît pas nécessaire de discuter la question de savoir si l'avantage (benefit) que l'intimée a, de fait et pour sa part, retiré de cet engagement allégué, est véritablement un avantage de la nature de celui dont parle Lord Lindley dans la citation précédente. Et il faudrait bien noter, dans la détermination de cette question subsidiaire si elle se présentait, nécessairement, que l'avantage retiré par l'intimée lui était déjà assuré par la loi sur les biens de la communauté et à la responsabilité de son mari.

De toutes façons, le moins qu'on puisse dire—et ceci suffit pour disposer de la question principale—, c'est que l'obligation qu'aurait alors contractée l'intimée à l'endroit de l'appelante, n'était pas uniquement pour sa propre affaire, mais qu'elle aurait ainsi également engagé ses propres pour l'avenir, pour le bénéfice de son mari, aussi bien que pour le sien. Dans *Banque Canadienne Nationale* v. *Audette* (1), cette Cour a décidé, à la page 310:

...que l'obligation contractée par la femme avec son mari est sans effet *lorsqu'elle n'est pas uniquement pour sa propre affaire, mais l'est également pour le compte de son mari.*

Le même principe a été reconnu dans la cause de *Sterling Woollens and Silk Co. Ltd.* v. *Lashinsky* (2), où il a été affirmé en plus que, même la fraude d'un des époux ne peut entrer en considération pour empêcher la nullité des conventions faites en violation des dispositions de l'article 1301. Ce qui prime, c'est la fraude à la loi.

Avec déférence, il me faut ajouter que je ne puis voir ici d'application à la décision du Comité Judiciaire du Conseil Privé dans la cause de *La Banque d'Hochelaga* v. *Jodoin et autres* (3). Il est certain que si la loi défend ainsi à la

(1) [1931] S.C.R. 293. (2) [1945] S.C.R. 762.
(3) [1895] A.C. 612.

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femme de s'obliger avec ou pour son mari, autrement qu'en qualité de commune, elle permet cependant au mari de s'obliger pour les affaires propres de sa femme. La validité de tel engagement s'infère des dispositions de l'article 1302. Et dans cette cause, on a précisément jugé, en fait, que ce n'était pas la femme qui s'était obligée pour son mari mais bien ce dernier qui s'était obligé pour elle. En somme, et dans les termes mêmes du jugement, "The whole affair was the wife's affair".

Dans les circonstances de la présente cause, je dois donc conclure que si, comme on le prétend, l'intimée s'est engagée personnellement à supporter cette charge du mariage ou à en payer la dette en résultant, c'est là un engagement par lequel elle s'obligeait avec et pour son mari, autrement qu'en qualité de commune, et c'est précisément le cas visé par l'article 1301.

Cette conclusion paraît conforme à la doctrine. Langelier, Cours de droit civil, vol. 4, page 395, commentant sur les articles 1373, 1374 et 1375 du Code Civil:

> Que faut-il entendre par dettes de la communauté qui proviennent du chef de la femme? Il y en a deux espèces: les dettes qu'elle devait lors de son mariage et qui sont tombées dans la communauté, et celles qu'elle a contractées pendant son mariage avec l'autorisation de son mari.
>
> Quant aux dettes qu'elle devait lors de son mariage, il va de soi, comme je viens de vous le dire, qu'elle en reste tenue envers ses créanciers. Ils peuvent donc s'adresser à elle pour se les faire payer. Mais, si elle les paie, elle a droit de s'en faire rembourser pour moitié par la communauté si elle l'accepte, et pour le tout si elle y renonce.
>
> Quant aux dettes qu'elle a contractées pendant la communauté, vous avez vu dans l'article 1280, le paragrape 2, que la communauté en est tenue si elle les a contractées avec le consentement de son mari. Mais les créanciers envers lesquels elle les a contractées peuvent-ils se les faire payer par elle? Il faut distinguer: ou elle les a contractées pour elle-même, ou elle les a contractées pour son mari. Si elle les a contractées pour elle-même, ses créanciers peuvent se les faire payer par elle. *Si, au contraire, elle les a contractées pour son mari ou pour la communauté, ce qui revient au même, ils n'ont pas droit de se les faire payer par elle, car, comme vous l'avez vu lorsque nous avons étudié l'article 1301, une femme mariée ne peut s'obliger avec ou pour son mari que comme commune, et toute obligation qu'elle contracte en contravention à cette disposition est nulle.*

Mignault, Droit civil canadien, Vol. 6, page 329, traitant du passif de la communauté et de la contribution aux dettes:

> Si les deux époux se sont obligés solidairement, le mari pourra être poursuivi pour le tout, mais la femme, par application de l'article 1374, qui est une conséquence de l'article 1301, ne pourra être poursuivie que pour moitié, *en sa qualité de commune.*

L'auteur ajoute la note suivante après citation de l'article 1374:

a) Cet article est, comme l'article 1301, contraire à l'ancien droit, qui a été changé par notre législation provinciale (statuts refondus du Bas-Canada, ch. 37, s. 55); il est aussi opposé au code Napoléon (art. 1487) qui a reproduit l'ancien droit et qui permet de poursuivre la femme pour le tout, si l'obligation est solidaire, et pour moitié, si elle n'est que conjointe.

Et l'auteur continue:

Si la femme s'est obligée conjointement avec son mari, elle sera tenue pour moitié seulement (art. 1374): ce n'est en effet, que *comme commune* et dans cette limite qu'elle a joué le rôle de débitrice. Quant au mari, il sera tenu pour le tout: car, en faisant intervenir sa femme au contrat, il a entendu, non pas s'obliger pour moitié seulement, en rejetant l'autre moitié sur sa femme, mais donner au créancier une garantie de plus.

A cela, la note suivante est jointe:

b) Je suppose que la dette n'a pas été contractée pour le bénéfice de la femme, et alors on peut dire que les deux époux se sont obligés comme communs en biens. Partant, c'est une dette de la communauté, et le mari la devrait en entier par application de l'article 1371.

Des conclusions différentes sont adoptées en France, où les commentateurs signalent précisément que le sénatus-consulte Velléien, inspiration de notre article 1301, est depuis longtemps disparu du droit français, droit dans lequel on ne retrouve pas, d'ailleurs, de dispositions correspondantes à notre article 1374, corollaire de l'article 1301.

Colin et Capitant, Droit civil français, Tome 3, 1950, p. 180, n° 284:

Lorsque le mari et la femme s'obligent solidairement, ils sont, sans contestation possible, tenus l'un et l'autre pour la totalité de la dette, non seulement pendant la communauté, mais après sa dissolution, aussi bien sur leur part de communauté que sur leurs biens propres. Aussi, en fait, les créanciers qui traitent avec un homme marié ne manquent-ils jamais d'exiger, nous l'avons déjà dit, cet engagement solidaire. *Nul texte n'interdit du reste à la femme de prendre un engagement de ce genre, car le sénatus-consulte Velléien a depuis longtemps disparu de notre Droit.*

Quant à l'exception de bonne foi prévue en l'article 1301, il est manifeste que l'appelante ne peut l'invoquer. Ses appréhensions sur le paiement établissent suffisamment la connaissance qu'elle avait de la situation financière du mari et le but véritable de ces engagements subsidiairement obtenus par elle de la femme, à la suggestion du mari. De plus, elle devait, ou au moins elle pouvait connaître le régime matrimonial des époux et les conséquences légales en résultant.

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Mais, invoquant les dispositions des articles 165, 173 et 1317 du *Code Civil*, l'appelante soumet un autre argument. En somme, dit-on, vu l'absence de moyens de la communauté et du mari, l'existence des moyens de la femme, pour supporter cette charge du mariage, l'intimée est devenue, à raison de ces faits et par la force des dispositions ci-dessus, actuellement et légalement obligée à ce faire. En s'engageant, comme on le prétend, à l'endroit de l'appelante, elle ne faisait, dit-on, que reconnaître et décharger l'obligation alimentaire,—civile ou naturelle, peu importe, ce qui lui était devenue propre de par la loi.

Notre Code reconnaît particulièrement deux sources d'obligations relativement aux aliments: D'une part, l'obligation purement légale, existant indépendamment de toutes conventions matrimoniales, et, d'autre part, précisément, l'obligation conventionnelle arrêtée par les futurs époux aux fins de leur union. La première est d'ordre public et on n'en peut écarter le principe dans les conventions matrimoniales; et, en ce sens, elle prime sur celles-ci. Mais puisque, sous cette réserve, l'obligation conventionnelle est non seulement autorisée mais que la loi elle-même, suppléant à l'absence de contrat de mariage, veut que les époux soient tenus comme ayant convenu d'accepter le régime de la communauté légale, il faut donner effet à cette obligation conventionnelle. Autrement, les dispositions de la loi qui y sont relatives, deviennent inutiles. Dans ce sens pratique, l'obligation conventionnelle prime donc sur l'obligation légale qui ne peut être invoquée qu'à titre exceptionnel et subsidiaire. Il appartient donc à celui qui veut s'en prévaloir de justifier de son droit à ce faire en démontrant, par la preuve de circonstances particulières, l'inefficacité de l'obligation conventionnelle pour assurer le minimum garanti par l'obligation légale.

Traitant de la contribution aux charges du mariage dans le cas de séparation de biens, Mignault, Droit civil canadien, Vol. 6, page 397, ayant cité l'article 1423, dit:

> Donc la première chose à consulter c'est le contrat de mariage. S'il a été stipulé que le mari seul subviendra aux dépenses du ménage, et qu'il soit en état de le faire, la femme ne peut être forcée d'y contribuer, ni par son mari, ni par ses créanciers. Si elle s'est personnellement obligée, son obligation paraît être une violation de la prohibition de l'article 1301, car la femme s'est obligée pour son mari, seul débiteur dans ces circonstances.

C'est là reconnaître le caractère exceptionnel et subsidiaire de l'obligation légale dans le cas où on a convenu de la séparation de biens. A fortiori, la même conclusion s'impose sous le régime de la communauté légale.

En la présente cause, je ne puis trouver au dossier la preuve de ces circonstances nécessaires à la mise en jeu de l'obligation légale par dérogation à l'obligation conventionnelle. Et il devient alors évident que si, ni Kelly, ni sa fille ne pouvaient, sur la base des faits révélés par la preuve, invoquer avec succès, contre l'intimée, cette obligation légale, l'appelante, invoquant les droits de Kelly et sa fille,—assumant qu'elle en ait le droit,—ne peut davantage réussir.

Sous le régime de l'obligation légale, le droit aux aliments se conditionne et se mesure par la relation existant entre les besoins de celui qui les réclame et les moyens de celui à qui on les demande.

Sans doute, Kelly avait contre lui des jugements pour la satisfaction desquels il paraissait afficher peu de souci. Il était, cependant, en bonne santé et pouvait travailler. Et, dans les termes de Planiol et Ripert, tome 2, éd. 1926, Traité de droit civil français, page 25:

> Un individu qui peut se procurer de quoi vivre en travaillant n'a pas droit à des aliments, quoiqu'il n'ait pas de biens; il n'est pas même nécessaire que cette profession lucrative soit exercée en fait, il suffit que son exercice soit possible.

En fait, la preuve établit que Kelly avait, par son travail, touché récemment une somme de dix mille dollars. Cette preuve n'est pas contredite et le dossier ne révèle aucune tentative, qu'il était loisible à l'appelante de faire, pour la vérifier et l'écarter. Il aurait, également, obtenu par un emprunt un montant de cinq mille dollars. Ceci, non plus, n'est pas contredit.

Quant aux moyens de l'intimée, il appert que les seuls argents dont elle disposait dans les premiers mois de leur séjour à l'hôtel Viger, étaient représentés par une somme de $166 par mois. Les charges mensuelles de l'hôtel,—exception étant faite pour les deux mois où, à la demande seule du mari, les frais d'hôtel de ses amis furent portés et ajoutés au compte des Kelly—, étaient en moyenne de cinq cents dollars. Il est vrai qu'éventuellement, le revenu

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mensuel de l'intimée s'éleva à cette somme, laquelle, suffisante pour couvrir le compte mensuel d'hôtel pour les époux et leur enfant, demeurait insuffisante au paiement de toutes les autres charges du mariage, et des dettes accumulées.

Il paraît évident, en somme, que les Kelly n'avaient pas, alors, les moyens de vivre à l'hôtel de l'appelante. La liberté que peuvent s'accorder les époux d'assumer des obligations au-delà de leurs moyens, aussi bien que la liberté du créancier de miser sur les expectatives de paiement, l'insouciance d'un mari à satisfaire aux jugements rendus contre lui ou, même, l'habileté qu'il peut avoir à soustraire ses gains au recouvrement de ses créanciers, son refus ou sa négligence de travailler, ne suffisent pas pour déplacer ou transformer une obligation alimentaire que la loi place à sa responsabilité vis-à-vis sa famille, aussi bien que vis-à-vis les tiers, pour en faire une obligation personnelle contre la femme commune en biens, et ses propres.

Le cas actuel n'est pas celui d'un époux totalement frappé d'indigence et d'impotence, ni celui d'une épouse financièrement suffisamment pourvue en fonction des charges assumées.

On a, enfin, invoqué le principe que nul ne peut s'enrichir aux dépens d'autrui. Si, en l'espèce, ce principe devait prévaloir contre les dispositions d'ordre public de l'article 1301, ces dernières deviendraient absolument sans effet. Il suffit bien de considérer tous les cas où les tribunaux ont appliqué cet article pour se convaincre que, dans la majorité, les débiteurs poursuivis—sans succès, à raison du principe de l'article 1301—s'étaient enrichis aux dépens du créancier poursuivant.

Pour ces raisons, je renverrais le présent appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *L. G. Prévost.*

Solicitor for the respondent: *C. M. Cotton.*

IRVING H. GROSSMAN and GUS SUN (SUPPLIANTS) ..... } APPELLANTS; 1951 *Oct. 10, 11, 12, 15

AND

HIS MAJESTY THE KING, (RESPONDENT) ..... } RESPONDENT. 1952 *Feb. 5

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Airports—Operated by Crown—Duty to make safe for aircraft—Warnings of Danger—Crown—Whether breach of duty by servant acting within scope of his employment, renders Crown liable under s. 19(c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended.

On July 19, 1948, the appellant Grossman, piloting a light aircraft approached the Saskatoon airport, operated by the Department of Transport. Preparatory to landing he had observed workmen on the concrete runways, and diverted his course to a grass runway. While taxiing to a stop he suddenly noticed some distance in front an open ditch which cut across the runway. In attempting to take-off again he was unsuccessful in avoiding the ditch with the result that his aircraft was damaged beyond repair and his passenger and fellow appellant, Sun, was injured. The ditch in question, was not, in the view of the Court, sufficiently marked by a number of posts on which red flags had been placed by one Nicholas, the airport maintenance foreman, and they had not been seen by Grossman. The appellants' action to recover damages under s. 19(c) of the *Exchequer Court Act* as amended, was dismissed in the Exchequer Court where the damages of Grossman were assessed at $7,003.90 and those of Sun at $440.

Held: (Rinfret C.J. and Locke J., dissenting) that:

1. The open ditch across the grass runway constituted an obstruction and was recognized as such by Nicholas. In failing to provide adequate warning of the danger he failed in his duty to persons such as the appellants, and this breach of duty was negligence for which the Crown under s. 19(c) of the *Exchequer Court Act* was responsible. *The King* v. *Canada Steamship Lines Ltd.* [1927] S.C.R. 69 and *The King* v. *Hochelaga Shipping & Towing Co. Ltd.* [1940] S.C.R. 153, followed.
2. No negligence could be attributed to Grossman.
3. As the total amount claimed by Sun was $440, the Court under the provisions of the *Exchequer Court Act,* had no jurisdiction to hear his appeal which should therefore be quashed.

Per (Rinfret C.J. and Locke J., dissenting). The claim was not for an act of misfeasance but of alleged non-feasance. If there was failure on the part of Nicholas to cause adequate measures to be taken to warn aviators and such failure caused or contributed to the accident, Nicholas was not personally liable and accordingly the action against the Crown should fail.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ.

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The King v. *Canada Steamship Lines, supra* and *The King* v. *Hochelaga Shipping & Towing Co. Ltd., supra* distinguished. *The King* v. *Anthony* [1946] S.C.R. 569, *Adams* v. *Naylor* [1946] A.C. 543, *Lane* v. *Cotton* 12 Mod. 473, *Perkins* v. *Hughes*, Say. 41, *Mersey Docks Trustees* v. *Gibbs* (1866) L.R. 1 H.L. 93, referred to: *Donoghue* v. *Stevenson* 1932 A.C. 562, distinguished. The matter was not affected by the *Air Regulations* enacted under the Aeronautics Act, R.S.C. 1927, c. 3, which were not expressed as applying to the Crown.

APPEAL from the Exchequer Court of Canada (1) dismissing a petition of right against the Crown with costs.

J. M. Cuelenaere K.C. for the appellants. The suppliants bring their action pursuant to the provisions of the *Exchequer Court Act*, R.S.C. 1927, c. 34 and in particular under s. 19(*c*) of that Act as amended by 1938 (Can.) c. 28, and seek to recover damages suffered by them as a result of an accident as outlined in the Statement of Facts. It is admitted in the pleadings and it was found by the learned trial judge that the Saskatoon Airport was constructed by the Crown as a Public Work and is being maintained and operated as a licensed airport for the use of the public. Such maintenance and operation is under the general supervision and direction of Earl Hickson, District Inspector of Airways, and managed by Philip R. Nichols. Both are servants of the Crown. The fact that the accident took place and the nature of the injuries suffered, it is submitted, were well established.

Broadly the question to be determined is whether the loss or damage suffered by the suppliants was due to the negligence of any officer or servant of the Crown, while acting within the scope of his duty or employment, so as to make the Crown liable in damages under s. 19(*c*).

It is submitted the trial judge was right in finding as he did that the officers of the Crown in charge of the airport were negligent and that the negligence consisted in the officers' failure to give or provide adequate warning. It is submitted they were negligent in the following respects:

(1) Allowing the ditch in question to remain open after it became known that it constituted an obstruction or hazard to flying.

2. Allowing the ditch to remain without being clearly marked.

(1) [1950] Ex. C.R. 469.

The general and accepted practice at airports and the *Air Regulations* require that any obstruction existing at a landing area be marked. (s. 12, *Air Regulations*.)

3. Allowing grass and weeds to grow and debris to accumulate in the ditch, making it difficult, if not impossible, to sight the ditch from the air.

4. Having allowed land markers visible from the air to remain on the grass runways, and the word "Airport" to remain on a building adjacent to such runways; failure to mark the end of such runways or to give adequate warning of the obstruction or hazard to any person using such runways. Each of the above enumerated particulars or two or more taken together constituted negligence on the part of the officers or servants of the Crown.

The liability of the Crown under s. 19(*c*) has been discussed in numerous cases. In *Rex* v. *Anthony* (1) Rand J. sets out the nature of the negligence giving rise to liability on the part of the Crown. In the present case the acts of the officers or servants of the Crown constitute positive conduct within the scope of their duties or employment. The Crown and its officers or servants owed a duty to the suppliant as user of the airport and failed to discharge that duty in such a manner as to raise a liability on the servant for which the master (the Crown) becomes liable. *Sincenne McNaughton Line* v. *The King* (2); *Yukon Southern Air Transport* v. *The King* (3); *Howard* v. *The King* (4); *The King* v. *Hochelaga Shipping* (5). In none of the above cases was the question of invitation discussed. The liability of the Crown was based on the use of a public work by a person lawfully on the premises. The cases cited set out the principle relating to the liability of the Crown under s. 19(*c*). In the present case the airport was a public work built by and at the expense of the Dominion Government and maintained and operated by the officers and servants of the Crown for the benefit of the Crown and for the use of the public. In the light of these authorities it is submitted that the suppliants suffered injury and that the officers or servants of the Crown were negligent, and the trial judge should have held that the suppliants were

(1) [1946] S.C.R. 569.
(2) [1926] Ex. C.R. 150; [1928] S.C.R. 84.
(3) [1942] Ex. C.R. 181.
(4) [1924] Ex. C.R. 143.
(5) [1940] S.C.R. 153.

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entitled to recover. Alternatively, he erred in holding the suppliants were licensees and in not holding that they were invitees.

The Saskatoon Airport is an airport designated as such by the Minister of Transport. The *Air Regulations,* Part III s. 1, require that no area shall be used as an airport unless it has been licensed as required by the regulations. The airport is so licensed. It was constructed and is maintained and operated for the purpose of providing facilities for aerial transportation. The *Air Regulations,* Part III, s. 6, grants to the operator of any licensed airport permission to charge for its use or for any services performed, such fees as have been approved by the Ministry. The Saskatoon Airport provides hangar facilities, repair servicing, fuel and oil.

Where an airport is operated by a public authority, such public authority, either expressly or by implication, invite the public requiring such facilities to use that airport, and the position of such public authority, its officers or servants, is no different to the owner of a private commercial landing field. As to the latter see *Beck* v. *Wing Field* (1).

The liability of public authorities with respect to buildings is set out in: *Arder* v. *Winnipeg* (2); *Nickell* v. *Windsor* (3); *Edmondson* v. *Moose Jaw School District* (4); *Blair* v. *Toronto* (5).

The trial judge ought to have found the suppliants were invitees. If invitees, the common law imposes a duty to take reasonable care against endangering life or property. Charlesworth, *The Law of Negligence* at 154, quoting *Parnaby* v. *Lancaster Canal Co.* In *Imperial Airway Ltd.* v. *Flying Service Ltd.* (6) it was held that under English law the owner of a public airport is bound: (*a*) To see that the airport is safe for the use of aircraft entitled to use it, and (*b*) To give proper warning of any danger of which he knows or should know. *Peavey* v. *City of Miami* (7) quoted by the trial judge is distinguishable. There the pilot knew that the airport was then under construction, and he had a blind spot in his aircraft. In the present

(1) (1941) U.S. Av. R. 76 (E.D. Pa.)
(2) (1914) 7 W.W.R. 294.
(3) [1927] 1 D.L.R. 379.
(4) (1920) 3 W.W.R. 979.
(5) (1927) 32 O.W.N. 167.
(6) (1933) U.S. Av. R. 50.
(7) (1941) U.S. Av. R. 28.

case the danger was not reasonably foreseeable. Where the user of the premises is an invitee it is no defence to show that the danger was open and obvious, if in fact reasonable steps have not been taken to protect the person coming on the premises. Knowledge of the condition may establish contributory negligence on the part of the user, but here, there was no knowledge. Charlesworth *supra* at 157, 136 and 123. In the light of the authorities referred to and the facts of this case, the trial judge ought to have found that the Suppliants were invitees and that there was a breach of duty committed by the officers or servants of the Crown giving rise to liability on the part of the Crown. In the further alternative, even if the suppliants were licensees, the trial judge erred in holding that the ditch in question was an obvious danger and in not holding that the ditch was in the nature of a trap, and in holding that Grossman failed to take reasonable care or was guilty of negligence. The evidence discloses that Grossman acted reasonably and diligently exercising the same care as other pilots would have exercised under similar circumstances. In the alternative, if the finding of negligence on the part of the suppliant Grossman is accepted, the trial judge should have held that the damage or loss was caused by the fault of both the officers or servants of the Crown and the suppliant, and should have determined the degree in which each was at fault and directed that the suppliants were entitled to recover in proportion to the degree in which the servants of the Crown were at fault. *The Contributory Negligence Act* 1944 (Sask.) c. 23, ss. 2 and 3. The liability of the Crown under s. 19(*c*) of the *Exchequer Court Act* is not confined to cases where the negligent act of the Crown's officer or servant is the sole cause of the injury. *The Contributory Negligence Act* (Sask.) applies against the Crown. *The King* v. *Laperriere* (1); *The King* v. *Murphy* (2); *Arial* v. *The King* (3); *Blair* v. *Toronto, supra.*

G. H. Yule K.C. and *David Mundell* for the respondent. No case against the Crown was made out in the petition or on the evidence. The Crown is not liable in tort except

(1) 1946 S.C.R. 415. (2) [1948] S.C.R. 357.
(3) [1946] Ex. C.R. 540.

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in so far as liability is imposed by statute. *Tobin* v. *The Queen* (1); *Feather* v. *The Queen* (2). The appellants must rely on s. 19(c) of the *Exchequer Court Act*, as amended by 1938 (Can.) c. 28. *The King* v. *Anthony* (3); *The King* v. *Murphy* (4). In para. 8 of the petition the appellants assert "that the said officers and servants of the Crown (the said officers' refer back to the officers and servants in para. 7 who allegedly constructed the ditch) owed a duty to the suppliants to construct and maintain an airport fit for landing and the suppliants say that it was the duty of the said officers and servants to see to it that the said ditch was properly filled in, protected and adequately marked, but failed in the performance of that duty while acting within the scope of their employment by allowing the said ditch or excavation to remain open as aforesaid and/or without adequate markings. The ditch was constructed under contract with the Department of Transport by the Tomlinson Construction Co., relevant parts of which are to be found in the case. The ditch was designed to be an open ditch and to be kept open for drainage purposes. The Crown does not owe any duty as occupier to licensees coming on property that it occupies and servants of the Crown in charge of Crown premises are not occupiers and therefore do not owe any such duty. *Adams* v. *Naylor* (5).

The trial judge erred in holding that the Crown owed any duty to the appellants and should have held that the appellants had not brought themselves within the requirements set forth in the *Anthony* and *Murphy* cases to prove personal negligence on the part of some officer or servant of the Crown; that is a breach of duty owed by an officer or servant of the Crown to the appellants. This not having been done, it is submitted that the *King* v. *Hochelaga Shipping & Towing Co.* case referred to by the trial judge at p. 198 is not in point.

If the appellants were licensees on Crown property, and if either the Crown or any officer or servant of the Crown, as occupier, owed any duty to the appellants as licensees, the only duty owed by the Crown or any such officer or

(1) (1864) 16 C.B. (N.S.) 610.
(2) (1865) 6 B. & S. 257.
(3) [1946] S.C.R. 569 at 571-72.
(4) [1948] S.C.R. 357 at 365.
(5) [1946] A.C. 543.

servant would be to warn the licensees of any concealed danger or a trap. The petition does not allege a breach of any such duty nor does the evidence disclose any which would bring on him personal responsibility to the appellants. The only person on the evidence who was personally in charge of the airport was Nicholas, who is described as "Air Port Maintenance Foreman". Could Grossman have successfully asserted personal negligence by Nicholas? It is submitted not. The trial judge erred in holding that the appellants were licensees on that part of the property of the Crown where the accident took place. A licensee is one who comes on the property by permission, express or implied, for his own purposes. It is doubtful if on the allegation in the petition the appellants are entitled to assert that they were licensees on the area where the accident took place but in any event it is submitted that they were not licensees. That area was formerly a landing field for the R.C.A.F. When the department took over and built the new runways, that area was not maintained by the Crown.

It is conceded that Grossman would have been a licensee of the Crown in landing on the hard-surfaced runways. The onus is on him to establish permission to land where he did. He must bring himself within the area of permission, the same as the invitee must bring himself within the area of invitation. There is no evidence that would establish permission to land where he did. The simple fact is that Grossman decided not to land on any of the four serviceable hard-surface runways but picked out the grassy area because he thought it looked like a good place to make a landing. His case appears to be that he has the right to dictate to the Crown where he shall land and that the Crown has no control over the situation at all. Exhibit 2, a diagram of the Saskatoon airport, shows a portion described as "Dotted area is abandoned airdrome". This is the area in which the accident took place. This exhibit, on which the Attorney General relies strongly, is an official publication obtainable from the Department of Natural Resources, Engineering Division, and can be had for the asking. Grossman had in his possession a map prepared in 1941, before the Saskatoon Airport was constructed and he never applied for any other information, maps or any other material before he decided

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to come to an airport of which he knew nothing. The permission, held out by the Department of Transport is the permission indicated by Exhibit 2, and if he had asked for a copy of this, the area of permission would have been plain. How can he be heard to say when he did not take the elementary precaution to get such a document from the department that he has the right to dictate the area of permission? If he had he would have seen detail as to the radio range and how to contact it, and would have been told where to land and to keep away from the area where he was hurt.

The appellants contend that because the grassy area on which Grossman landed was so used by other aircraft, that that would imply permission by conduct for him to land on the same area. This is not so. In order to establish such permission (1) There would have to be much more evidence than there was here to establish the circumstances regarding the use of this area by other craft. (2) If this craft was using the area by tolerance, to establish permission on the part of the Crown it would have to be shown that responsible officers knew of such use. (3) In any event Grossman would have to show that he relied on previous use as implied permission.

On the first point, there was no evidence under what circumstances or arrangements, if any, between Saskatoon Flying Club and the department this area was used by the club. It is to be assumed there must have been some contractual relationship. It is a fair assumption that other light aircraft landing on the area might have been doing so under some arrangement with the Flying Club, or without permission. The building marked "airport" is a C.P.R. building. If C.P.R. light aircraft were using the area, surely it would be with some contractual arrangement with the department and not by leave and licence or tolerance amounting thereto. On the second point, in order to establish leave and licence of the Crown, it would have to be shown that responsible officers of the department knew of such use. *Jenkins* v. *Great Western Ry.* (1); *Pianosi* v. *C.P.R.* (2). On the third point, assuming responsible officers of the department knew that light aircraft had been landing on the area for some time, Grossman,

(1) [1912] L.R.K.B.D. 525 at 533. (2) [1944] 1 D.L.R. 161 at 167.

to establish leave and licence to him, would have to show that he was aware of such licence. *Clark & Linsell,* Ed. 10, p. 653; *Lowrey* v. *Walker* (1).

In all these cases the injured party asserting leave and licence because of prior use by others, knew of the prior use and assumed that it would be in order for him to enter as the public had been doing. Here, Grossman had no such knowledge. *Coleshill* v. *Manchester Corporation* (2); *Jenkins* v. *Great Western Ry.* (3). It is submitted that the appellants would have to establish permission to land on the area. Assuming Grossman had been invited to land on the new runways and being an invitee was entitled to a higher degree of duty than a licensee, it is submitted that he would be outside the extent of the invitation if he landed where he did, or, in any event, would have to prove that the area was within the area of invitation. 23 Halsbury, 606, para. 855; *London Graving Dock Co.* v. *Horton* (4).

If Grossman used this area by leave and licence of the Crown, then the reasons of the trial judge are relied on, holding that there was no breach of duty on the part of the Crown to Grossman and his unfortunate accident was entirely due to his fundamental failure to use care for his own safety on strange territory. *Hounsell* v. *Smyth* (5); *Mersey Dock & Harbour Board* v. *Procter* (6); *Bay Front Garage Ltd.* v. *Evers* (7).

The judgment of the Chief Justice and Locke J. (dissenting) was delivered by:—

LOCKE J.:—The claim of the appellants against the Crown as pleaded is for damage sustained by an aeroplane, the property of the appellant Grossman, and personal injuries by the appellant Sun when an airplane, the property of and piloted by the former, landed at an airport near Saskatoon owned by the Crown and operated by the department. On the day in question the appellants had flown from Prince Albert to Saskatoon and they allege that when they arrived at the airport at the latter place they saw a building on which the word "airport" was legibly

(1) [1911] A.C. 10.
(2) 97 L.J.K.B.D. 229.
(3) [1912] 1 L.R. K.B.D. 525 at 534.
(4) [1951] 2 All E.R. 1.
(5) 141 E.R. 1003 at 1008.
(6) [1923] L.J.K.B. 479 at 489.
(7) [1944] S.C.R. 20.

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painted and observed landing strips and some other buildings, whereupon they proceeded to land, when the plane ran into a ditch which crossed part of the airport causing the damage and injuries complained of. Other than the fact that the word "airport" thus appeared, no invitation or permission to use the facilities of the airport is alleged.

The exact nature of the claims as pleaded is to be noted: after alleging that the ditch was not marked by clearly visible markings and was not "detectable" from the air, the appellants asserted that the ditch was made by officers and servants of the Crown "while acting within the scope of their duties of employment and in the course of establishing and constructing the said airport the said officers and servants allowed the ditch or excavation to remain open in such a manner as to provide a danger or hazard to aircraft landing at the said airport," and again:—

> the said officers and servants of the Crown owed a duty to the suppliant to construct and maintain an airport fit for landing, and the suppliants say that it was the duty of the said officers and servants to see to it that the said ditch was properly filled and protected and adequately marked, but failed in the performance of that duty while acting within the scope of their employment by allowing the said ditch or excavation to remain open as aforesaid and without adequate markings.

The appellants did not plead that there was any duty owing to them by the Crown but, showing a proper appreciation of their legal position, founded their claims on the alleged negligence of officers or servants of the Crown under subsection (*c*) of section 19 of the Exchequer Court Act.

While the claims as thus pleaded appear to be directed to the acts and defaults of the officers and servants of the Crown who, it was contended, caused the ditch to be excavated, and allege apparently a continuing duty on their part after its construction to see that it was protected and adequately marked, and are not directed to those of the officers or servants who were in charge of the airport at the time of the accident, I think, in view of the course of the trial in which inquiry was made without objection as to the identity and duties of various officers and employees of the Department of Transport at the time of the accident, that they should be considered as if a duty on the part of some or more of these persons towards the plaintiff had been pleaded and put in issue.

The action was tried before Mr. Justice Cameron and dismissed on the ground that the proximate cause of the accident was the negligence of the appellant Grossman. In arriving at this conclusion, the learned trial judge considered that the legal relationship existing between the Crown and Grossman was that of licensor and licensee and that the respective obligations of the parties were defined by cases such as *Fairman* v. *Perpetual Building Society* (1), and *Mersey Docks* v. *Procter* (2). Accordingly, on the footing that the Crown owed a duty to warn Grossman of the danger from the open ditch, only if it was not known to him or obvious if he had used reasonable care, and that he had failed to use such care, the action failed. With great respect for the opinion of the learned trial judge, I do not think the issues in the present case are to be determined on the basis that the Crown owed the appellants any such duty. The Crown owes no duty to the subject *qua* owner or occupier of property and it will be noted that no such claim is advanced in the petition of right. The matter must be decided, in my humble opinion, upon other principles.

The jurisdiction of the Exchequer Court to hear and determine claims against the Crown for injury to the person or to property, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, and the right of the subject to recover damages for loss so occasioned were established in Canada by section 16(*c*) of c. 16 of the Statutes of 1887. The history of this enactment has been traced by Duff C.J. in *The King* v. *Dubois* (3). In the form in which it now appears after the amendment made by s. 1 of c. 28 of the Statutes of 1938, it is s. 19(*c*) of the Exchequer Court Act (c. 34, R.S.C. 1927). Prior to the Act of 1887 it had been decided by this Court in *The Queen* v. *McFarlane* (4), following *Canterbury* v. *The Attorney General* (5) and *Tobin* v. *The Queen* (6), that the Crown was not liable for injuries occasioned by the negligence of its servants or officers and that the rule *respondeat superior* did not apply in respect of the wrongful or negligent acts of those

(1) [1923] A.C. 74.
(2) [1923] A.C. 253.
(3) [1935] S.C.R. 378 at 381 et seq.
(4) (1882) 7 Can. S.C.R. 216 at 234.
(5) (1843) 1 Phill 306.
(6) (1864) 16 C.B.N.S. 310.

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engaged in the public service. Of the many cases in which the effect of the section, in so far as it touches the present matter, is concerned, it is only necessary, in my opinion, to refer to three.

In *The King* v. *Canada Steamship Lines* (1), the steamship company claimed to recover for loss sustained in consequence of the collapse of a landing slip on a government wharf at Tadoussac. The pleadings alleged negligence on the part of various persons in the employ of the Department of Public Works. One Brunet, an assistant government engineer in the Quebec office of the department, whose duties required him from time to time to make inspections of Dominion government properties, had, some three days prior to the accident, landed at the wharf in company with a number of passengers from a vessel of the steamship company, and he said that the condition of the slip aroused apprehension in his mind for the safety of the passengers. On the following morning, he made what Anglin C.J. described, in delivering the judgment of the court, as a casual and perfunctory examination of the wharf, and, after requesting one Imbeau to examine the slip and make a written report, left Tadoussac. Imbeau who, it appears, was engaged as a foreman by the department, whenever government work was done at Tadoussac, but was not a regular employee, made an examination of the wharf and reported to the district engineer on July 7th that he had found the slip was in a very dangerous condition. On the same date the accident which gave rise to the claims occurred. The judgment in this Court found liability in the Crown. After saying that, had Imbeau been in the employ of the government when he inspected the slip on the 6th of July, his failure either to bar access to the slip or, if he had not authority to do so, to advise the department by telegram of the imminent danger, or at least to warn the responsible officers of the Canada Steamship Lines against making further use of the slip until it had been put in a safe condition, would have amounted to negligence which would have imposed liability upon the Crown, it was said that the evidence did not sufficiently establish that Imbeau was an officer or servant of the Crown, within the meaning

(1) [1927] S.C.R. 68.

of section 20(*c*) (now 19(*c*)) of the Exchequer Court Act. The fault of Brunet which imposed the liability was thus described:—

> The case of Brunet is quite different. He was undoubtedly an officer or servant of the Crown. He came to Tadoussac in the discharge of his duties or employment. He saw the use that was being made of the slip which afterwards collapsed and immediately realized that its condition was dubious and had reason, as he says, to "fear" for its safety. He was told by Imbeau that there should be an inspection "comme il faut" of the slip because it might be "endommagé"—to see if it were not also in bad condition. Instead of clearing up his suspicions by an immediate personal inspection, or at least promptly reporting his fears to Quebec, or warning the officers of the steamship company of the probable danger of using the slip in its then condition, he contented himself with asking Imbeau to make an inspection and to report the result in writing to Quebec. In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part as an officer or servant of the Crown while acting within the scope of his duties or employment upon a public work.

In *The King* v. *Hochelaga Shipping and Towing Company, Limited* (1), the owner of a towboat claimed damages from the Crown for injuries sustained by the vessel in striking a portion of the outer cribwork and rock ballast of a jetty projecting from the Dominion government breakwater at Port Morien, Nova Scotia. While the jetty was under construction a portion of it had been swept away by a storm and, in the result, the cribwork and ballast referred to were submerged, their presence being apparently unknown to those in charge of the towboat. At the trial in the Exchequer Court the Crown was held liable. Angers J. found liability in the Crown under section 19(*c*) in the following terms:—

> After a careful perusal of the evidence I have come to the conclusion that the accident is attributable to the negligence of officers or servants of the Crown, namely the district engineer and the assistant engineer under whose supervision the construction of the jetty and its reparation after the top part of the outer end thereof had been partially washed away were effected, acting within the scope of their duties or employment upon a public work.

On the appeal to this Court, Duff C.J. said: (p. 155)—

> I agree with the learned trial judge that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any

(1) [1940] S.C.R. 153.

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such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the Exchequer Court Act.

Crocket J., with whom Rinfret J. (as he then was) and Kerwin J. agreed, after referring to the finding of negligence made at the trial, said that he agreed that the collision: (p. 163)—

> was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(*c*) of the Exchequer Court Act. It was not a case of mere non-repair or non-feasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

Davis J. said in part: (p. 170)—

> What is contended for by the Crown is that the Exchequer Court had no jurisdiction because there could be no duty on the Crown to remove the submerged pile of balast; consequently no duty on any officers or servants of the Crown to remove it and a fortiori no negligence on the part of officers or servants of the Crown in not removing it. But I agree with the view taken by the learned trial judge on the evidence, that is, that in the restoration and changes made in the jetty, there was negligence on the part of the officers or servants of the Crown while acting within the scope of their duties or employment upon the public work.

In *The King* v. *Anthony* (1), the claim advanced against the Crown was for a loss from fire started by a tracer bullet fired through the window of a barn by a private soldier. It was shown that at the time of the occurrence this man, in company with two non-commissioned officers, was driving along a road, the men being under orders not to fire except upon the command of a superior officer. The man whose act caused the damage had, at least once before he came to Anthony's property, fired live ammunition, and the contention of the suppliant was that the failure of the non-commissioned officers to prevent him from firing was negligence of the nature referred to in section 19(*c*) and imposed liability. The suppliant succeeded at the trial but this judgment was reversed and the action dismissed on the appeal to this Court. Rand J., with whose judgment Rinfret C.J. and Hudson J. agreed, in dealing with the liability imposed by the subsection, said in part: (p. 571)—

> I think it must be taken that what paragraph (*c*) does is to create a liability against the Crown through negligence under the rule of *respondeat superior,* and not to impose duties on the Crown in favour

(1) [1946] S.C.R. 569.

of subjects: *The King* v. *Dubois* (1) at 394 and 398; *Salmo Investments Ltd.* v. *The King* (2), at 272 and 273. It is a vicarious liability based upon a tortious act of negligence committed by a servant while acting within the scope of his employment; and its condition is that the servant shall have drawn upon himself a personal liability to the third person.

After saying that if the liability were placed merely on the negligent failure to carry out a duty to the Crown and not on a violation of a duty to the injured person, there would be imposed on the Crown a greater responsibility in relation to a servant than rests on a private citizen, Rand J. said further (p. 572):

> This raises the distinction between duties and between duty and liability. There may be a direct duty on the master toward the third person, with the servant the instrument for its performance. The failure on the part of the servant constitutes a breach of the master's duty for which he must answer as for his own wrong; but it may also raise a liability on the servant toward the third person by reason of which the master becomes responsible in a new aspect. The latter would result from the rule of *respondeat superior;* the former does not.

The majority of the Court considered that the non-commissioned officers owed no such duty towards the suppliant, as was contended for. Kerwin and Estey JJ. dissented, they both being of the opinion that one of these non-commissioned officers, one Williams, a sergeant major, owed a duty to the suppliant to prevent the men under his charge from firing and that, accordingly, the Crown was liable. In the *Canada Steamship's* case the evidence as to the scope of Brunet's duty was meagre and whether he was vested with authority to prevent the further use of the wharf for the purpose of landing passengers until it was rendered safe for use does not appear and, whether the "dereliction of duty" referred to in the passage from the judgment of Anglin C.J., above referred to, was of a duty owed to the Crown as his employer, or one which he owed to the steamship company or other persons who might utilize the wharf as a place to land, is not stated. Neither the various judgments written nor the written arguments filed by the parties in that case or in the Hochelaga case indicate that the question as to whether any officer or servant of the Crown had incurred personal liability was argued.

Some two years before this accident, extensive improvements and additions to this airport were made at the instance of the Department of Reconstruction and Supply

(1) [1935] S.C.R. 378. (2) [1940] S.C.R. 263.

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of Canada. Under a contract dated June 25, 1946, made between His Majesty, represented by the minister of that department, and Tomlinson Construction Company, Ltd., a contractor, the latter undertook, *inter alia,* the construction of two concrete landing strips, each something more than a mile in length, and the excavation of the open ditches for the purpose of draining water from these strips, this being effected by a system of buried pipes draining into the ditches. Mr. Edward F. Cook, the district airways engineer of the Department of Transport at Winnipeg, supervised the construction of these and other works necessary for the operation of an airport by the contractor. The plan of having these open ditches which were some 48 ft. in width and varied from 7 to 11 ft. in depth was no doubt that of the professional advisers of the Department and was obviously approved and adopted on behalf of the Crown by the minister. Such open ditches situate some 600 ft. from the hard-surface runways as a means of drainage were adopted at other airports constructed for the department at The Pas, Weyburn, Brandon, Portage la Prairie and Winnipeg. It is not suggested that Cook was himself responsible for the opening of these great ditches, nor charged with any duty in respect of them other than to see that the work was properly done by the contractor, nor that he had any continuing duty in regard to them afterwards. The work was not done by any officer or servant of the Crown but by an independent contractor under the terms of this contract. There was, however, at the airport an employee of the department by the name of Nicholas who was described as the airport maintenance foreman, a position which he had occupied for some time prior to 1946. In giving evidence he said that his duty was to supervise the airport and maintain it in good condition and, if it was necessary, to put up any markings to give instructions for this to be done. According to him, he had caused to be placed 18 or 20 red woolen flags approximately 2 ft. by 3 ft. in area on posts in the vicinity of the open ditches to indicate their presence. In paragraphs 7 and 8 of the petition of right which, for the reasons above indicated, I think should be taken as directed to the conduct of Nicholas, it is alleged that he owed a duty to the suppliants to properly fill in, protect

and adequately mark the ditches. There was apparently no officer of the Department of Transport, senior to Nicholas at Saskatoon, concerned with the operation of the airport, but it cannot be seriously suggested that he could have directed that the ditch, constructed under the direction of the Minister for these purposes, be filled in. I do not understand what is meant by the allegation that it was his duty to see that the ditch was properly "protected." The suppliants' claims must, therefore, be based upon the contention that Nicholas owed a duty to them and to other people who might resort with their planes to the airport to warn them of the presence of the ditch, and that the damages claimed resulted from a breach of this duty.

The question as to the liability of a servant of the Crown occupying a position such as that of Nicholas is not, I think, decided by the judgments of this Court in the *Canada Steamship* and *Hochelaga* cases, where the question of the personal liability of such officers or servants was not argued or, so far as the judgments rendered indicate, considered. Since the claims are based upon the alleged negligence of Nicholas, the appellants must establish that he owed a duty to them to warn them of the presence of the ditch. It is, of course, not sufficient that under his contract of employment with the Crown it was his duty to see that any dangers, obstacles or obstructions on the airport be marked, so as to warn aviators of their presence. Nicholas was neither the owner, occupant or operator of the airport and no liability in any such capacity can be asserted against him. The claim, therefore, is clearly not for an act of misfeasance but of alleged non-feasance.

In *Adams* v. *Naylor* (1), which was decided in the House of Lords a few weeks earlier than the decision of this Court in *Anthony's* case, a claim was advanced against an officer of the Royal Engineers for injuries sustained by children in a mine field laid by the military authorities as a measure for the defence of the country. It was the practice in England, under such circumstances when a Crown servant might be involved, for the Crown on request to supply the name, for example, of the driver of a Crown vehicle or the navigating officer of a Crown ship at the time of an accident,

(1) [1946] A.C. 543.

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and in this matter the Crown, when appealed to by the plaintiffs to furnish the name of the Crown servant who was in charge of the mine field and responsible for its maintenance, gave the name of Captain Naylor. In the Court of Appeal (1), in addition to considering the effect of the Personal Injuries (Emergency Provisions) Act 1939, which the Crown contended was an answer to the action, there was a lengthy discussion as to whether the children who had gone into the mine field without permission were trespassers and, if so, the nature of the duty owed to them as such. In the House of Lords Viscount Simon, after saying that, in his opinion, the action was barred by the provisions of the statute, pointed out that apart from that question the issues were not really issues between the plaintiffs and the Crown, the point being as to whether there was personal liability on the part of Captain Naylor. As to this he said in part (p. 550):

> The courts before whom such a case as this comes have to decide it as between the parties before them and have nothing to do with the fact that the Crown stands behind the defendant. For the plaintiffs to succeed, apart from the statute, they must prove that the defendant himself owed a duty of care to the plaintiffs and has failed in discharging that duty. Whether the plaintiffs in the present case would succeed in doing this it is superfluous to inquire, since the decision goes against them on other grounds; but it may be useful to put on record, in passing, that the success of the plaintiffs would depend on establishing the personal liability of the defendant to them, as the Crown is not in any sense a party to the action.

Lord Simonds, who stated his agreement with Viscount Simon, said in part (p. 553):

> I must confess that, had it not been for the fact that the Act under consideration afforded a defence to the action, I should myself have had great difficulty in understanding what was the duty alleged to be due from the defendant, an officer of His Majesty's army, to a member of the public in respect of acts done or omitted to be done in course of his military service.

Lord Uthwatt pointed out that the case had been treated in the Court of Appeal as if the defendant was the occupier of the land and that it was not open to the parties to the suit by agreement to have the matter dealt with on what was shown to be a false footing. The allegation made in the statement of claim as to Naylor's connection with the matter was that he was the officer of the Royal Engineers

(1) [1944] 1 K.B. 750.

"in control and responsible for the maintenance and safeguarding of the mine field", but the case pleaded had not been dealt with.

There is no statute in England corresponding to section 19(*c*) of the Exchequer Court Act imposing liability upon the Crown and apart from the issue as to the application of the Personal Injuries Act the question to be determined was the same as in the present case. Where the claim advanced against an officer or servant of an employer is for misfeasance, the issue of liability does not, of course, depend upon the existence of that relationship: it is the commission of the tortious act which gives the right of action. In *Lane* v. *Cotton* (1), the action was brought against the Postmaster General for the recovery of certain Exchequer bills which had been contained in a letter delivered to a clerk at the post office and lost. Holt C.J., who disagreed with the majority, he being of the opinion that the Postmaster General was liable, in referring to the liability of the clerk and officer of the post office appointed "to take in and deliver out" letters at the London Post Office, said in part (p. 489):

> It was objected at the bar that they have this remedy against Breese. I agree, if they could prove that he took out the bills they might sue him for it; so they might any body else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, quatenus such cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not quatenus a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer or refuser.

In *Perkins* v. *Hughes* (2), Lee C.J., delivering the judgment of the Court of King's Bench, said in part (p. 41):

> In the case of *Lane* v. *Cotton* (1), the following distinction, which, in our opinion, is well founded, was taken by Holt C.J. namely, that where an injury arises from the neglect of a servant, an action only lies against his master, for that a servant is not answerable, quatenus servant, for neglect: but that where an injury arises from the misfeasance of a servant, he is himself liable to an action, not quatenus servant, but as being a wrong-doer.

(1) (1701) 12 Mod. 488.

(2) (1752) Say 41.

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In *Mersey Docks Trustees* v. *Gibbs* (1), the House summoned a Court of judges consisting of Blackburn, Keating and Shee JJ. and Channell B. and Pigott B., requesting them to answer two questions necessary to be determined in the action. The judgment of this Court written by Blackburn J., after referring to the judgment in *Lane* v. *Cotton* on the question as to the liability of a public officer for the negligence of his subordinates, said in part (p. 111):

> But these cases were decided upon the ground that the government was the principal, and the defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shewn that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal, or against the immediate actors in the wrong.

and referred to Story on Agency, s. 313, as authority for the statement.

In Smith on Master and Servant, 8th Ed. 288, the learned author, after saying that as a general rule all persons concerned in the wrong are liable to be charged as principals, states:

> But for mere nonfeasance or omission of duty, a servant is not liable to answer in a civil action at the suit of third persons, but only to his own master, who, in accordance with the maxim already alluded to, "*Respondeat superior*," is liable to answer for his servant's neglect. This distinction between misfeasance and nonfeasance was thus stated by Lord Holt, in his celebrated judgment in *Lane* v. *Cotton*.

The statement of the law by Holt C.J. in *Lane* v. *Cotton* is referred to in Evans on Agency, 2nd Ed. 385, as the authority for the distinction between the liability of the employees for acts of misfeasance and of nonfeasance. In Story on Agency, 7th Ed. (1869) p. 385, the matter is dealt with as follows:

> The distinction, thus propounded, between misfeasance and nonfeasance,—between acts of direct, positive wrong and mere neglects by agents as to their personal liability therefor, may seem nice and artificial, and partakes, perhaps, not a little of the subtilty and over-refinement of the old doctrines of the common law. It seems however, to be founded upon this ground, that no authority whatsoever from a superior can furnish to any party a just defence for his own positive torts or trespasses; for no man can authorize another to do a positive wrong. But in respect to nonfeasances or mere neglects in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or

(1) (1866) L.R. 1 H.L. 93.

contract with each other; and no man is bound to answer for any such violations of duty or obligation, except to those to whom he has become directly bound or amenabe for his conduct. Whether the distinction be satisfactory or not, it is well established, although some niceties and difficulties occasionally occur in its practical application to particular cases.

It may be useful to illustrate each of these propositions by some cases which have been treated as clear, or which have undergone judicial decision. And, in the first place, as to the non-liability of agents for their nonfeasances and omissions of duty, except to their own principals. Thus, if the servant of a common carrier negligently loses a parcel of goods, intrusted to him, the principal, and not the servant, is responsible to the bailor or the owner. So, if an under-sheriff is guilty of a negligent breach of duty, an action lies by the injured party against the high sheriff, and not against the deputy personally, for his negligence.

In the United States courts the accuracy of the above statement of the law in *Lane* v. *Cotton* appears to have been generally (though not universally) accepted. Thus, in *Murray* v. *Usher* (1), Andrews J., delivering the judgment of the Court of Appeals of New York, said in part:

The general rule of *respondeat superior* charges the master with liability for the servant's negligence, in the master's business, causing injury to third persons. They may in general treat the acts of the servant as the acts of the master. But the agent or servant is himself liable, as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such cases the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former, the servant is in general liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity, and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone; and the nonfeasance of the servant causing injury to third persons is not, in general at least, a ground for a civil action against the servant in their favour. *Lane* v. *Cotton*, 12 Mod. 488; *Perkins* v. *Smith*, 1 Wils. 328; *Bennett* v. *Bayes*, 5 Hurl. & N. 391; Smith, Mast. & Serv. 216, and cases cited.

The same view of the law is expressed in the judgment of Martin J. (2), where the portion of the judgment of Andrews J. above quoted was approved and adopted. In *Kelly* v. *Chicago & Alton Railway Co.* (3), where a yard-master in the employ of the railway company was joined as a party defendant, the plaintiff alleging that he had neglected to make an inspection of the engine which had exploded and caused injuries, Philips J., referring to the above quoted passage from Story on Agency, held that the action did not lie.

(1) (1889) 23 N.E. 565.

(2) (1894) 75 Hun. 437 at 444.

(1) (1903) 122 Fed. 286.

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In my opinion, if there was failure on the part of Nicholas to cause adequate measures to be taken to warn aviators resorting to the Saskatoon Airport in their planes of the presence of the open ditch and if such failure caused or contributed to the accident, Nicholas is not personally liable and, accordingly, the action against the Crown should fail. The appellants' case cannot be placed upon a higher plane than it would be if Nicholas had been in the employ of a private person or a corporation, and in neither event would he, in my judgment, be personally liable, though the owner, occupant or operator of the airport might be. The appellants' difficulties are increased by the fact that the employer of Nicholas owed no such duty, as is asserted, against him to the appellants, but it appears to be unnecessary to deal with this aspect of the matter. For the contrary view, it may be said that aviators resorting to government aerodromes where they are at least permitted, if not invited, to land, are entitled to assume that some officer or servant employed by the government will take such steps as are necessary to warn them of danger from obstacles upon an airport and that this imposes liability on those employees of the Crown charged by it with that duty. I do not know how far it would be suggested that this liability should extend. Presumably, the officers of the Department of Transport whose duties would include that of seeing that Nicholas properly discharged his duties of maintenance at the airport and the government inspectors, if there were such, who inspected the airport facilities from time to time and who may have observed the warning flags exhibited and failed to do anything to remedy their inadequacy, if they were inadequate, would be involved in liability. Such a contention is not supported by authority, in my opinion.

With deference to contrary opinions, I do not think the point in this matter is affected by the decision in *Donoghue* v. *Stevenson* (1). In that case a shop assistant sought to recover damages from a manufacturer of aerated waters for injuries suffered as a result of consuming part of the contents of a bottle of ginger beer which had been manufactured by the respondent and which contained the decomposed remains of a snail. There was no claim against

(1) [1932] A.C. 562.

any employee of the manufacturer and the only point decided was as to the duty which the latter owed to the ultimate consumer of his product. While Lord Atkin, in dealing generally with the law of negligence, said in part:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

this, standing alone, is insufficient as a guide since there remains to be determined who is my neighbour. I am unable to believe that either this language or anything else said by Lord Atkin or by any of the other Law Lords who gave the majority decision in that case was intended to change the law as to the personal liability of an employee towards third persons injured by some failure on his part to perform a duty imposed upon him by his contract of employment. No such question arose for decision and the matter was not discussed either in the judgments or in the argument. There has been much discussion as to the exact point decided in the judgment of the majority of the court in *Donoghue's* case. There is an interesting discussion of the subject in the 14th edition of Pollock on Torts, pp. 344-5-6. I agree with the learned author that Lord Wright's statement as to this in *Grant* v. *Australian Knitting Mills Ltd.* (1), should be accepted, where, after referring to the decision in *Donoghue's* case and saying that their Lordships, like the judges in the courts of Australia, would follow it, said in part:

> The only question here can be what that authority decides and whether this case comes within its principles * * * Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin:
>
> > "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

The decision so summarized does not touch the point in the present case.

In the course of the able argument of Mr. Cuelenaere for the appellants, he referred to the Air Regulations enacted under the provisions of the *Aeronautics Act*, c. 3, R.S.C. 1927, which, *inter alia*, prescribe certain ground markings

(1) [1936] A.C. 85 at 102.

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to be exhibited on public aerodromes open to public use. These regulations cannot, in my opinion, affect the matter, since the aerodrome in question was operated by the Crown. Section 15 of the *Interpretation Act*, c. 1, R.S.C. 1927, declares that no provision or enactment in any Act shall affect, in any manner whatsoever the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby. The *Aeronautics Act* contains no such provision and while the regulations are declared to apply to state aircraft they do not assume to deal with the manner in which aerodromes operated by the Crown are to be marked.

The appeal should be dismissed with costs.

KERWIN J.:—The appellants' claim to recover against the Crown is based upon section 19(*c*) of the Exchequer Court Act as amended, by which that Court has jurisdiction to hear and determine a claim against the Crown arising out of any death or injury to the person or to the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. It must now be taken as settled by this Court in *Anthony* v. *The King* (1), that the Crown's officer or servant must owe a duty to the third person, the breach of which would make him liable to that third party before the Crown's responsibility could attach under the section; that is, the rule *respondeat superior* applies. Philip R. Nicholas was the airport maintenance foreman and that in doing what he did, at the Saskatoon Airport, he was acting within the scope of his duties or employment does not, I think admit of doubt, and in my view he owed a duty to Grossman not to leave the ditch across the grass runways undesignated by something observable from the air that would give an intending user of the field warning of the danger.

The Saskatoon Airport did not have tower control and it should, therefore, have been within the contemplation of Nicholas that a flier, intending to alight on a public airport, such as that at Saskatoon, would use the grasss landing strip while the cement one was being repaired. The

(1) [1946] S.C.R. 569.

decision of the House of Lords in *Bolton* v. *Stone* (1), must be taken as a decision on its own particular facts. This was a case where Miss Stone, while on a highway abutting a cricket ground, was injured by a ball hit by a player thereon. The House of Lords reversed the decision of the Court of Appeal and restored the judgment at the trial on the ground that although the possibility of the ball being hit on the highway might reasonably have been foreseen, that was not sufficient, as the risk of injury to anyone in such a place was so remote that a reasonable person would not have anticipated it. While the result to the unfortunate plaintiff was disastrous, there is nothing to indicate that the well-known rule as exemplified in *Donoghue* v. *Stevenson* (2), was departed from, viz., that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be liable to injure your neighbour. In my opinion the present case falls within that rule.

It is said that a mere act of omission by Nicholas would not be sufficient, and reference is made to the dissenting judgment of Lord Holt in *Lane* v. *Cotton* (3), where he states: "but for a neglect in him (a servant) they can have no remedy against him; for they must consider him only as a servant and then his negligence is only chargeable on his master or principal; for a servant or deputy, quatenus such, cannot be charged for negligence but the principal only shall be charged for it." This distinction sometimes referred to as the difference between misfeasance and nonfeasance has been generally recognized both in England and in the United States although not without some exceptions in the courts of the latter. The true rule, however, is I think that which distinguishes those cases where an agent is not liable in tort to third persons who have suffered a loss because of the agent's failure to perform some duty which he owed to his principal alone, from those cases where, in addition to a duty owing to the principal, the agent owed a duty to the third party. As Viscount Simon stated in *Adams* v. *Naylor* (4), the question whether the defendant in that case was personally liable was, of course, a question for the Court on the evidence.

(1) [1951] A.C. 850.
(2) [1932] A.C. 562.
(3) (1701) 12 Mod. 473.
(4) [1946] A.C. 543.

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In view of the basis of liability according to modern concepts in actions for tort, it should be held in the present case that Nicholas in either placing the flags, or permitting them to be placed or to remain in place, committed a negligent act for which he could be held liable at the suit of Grossman. That, I think, is consonant with the judgment of this Court delivered by Chief Justice Anglin in *The King* v. *Canada Steamships Lines Ltd.* (1), where it is stated: "In taking the risk of allowing the continued use of the wharf pending such report, and in failing to give any warning to the officers of the steamship company, Brunet was in my opinion guilty of a dereliction of duty amounting to negligence on his part." Leave to appeal to the Judicial Committee was refused. The view I have expressed is also consistent with the decision in *The King* v. *Hochelaga Shipping and Towing Company, Limited* (2). In the reasons of the majority, delivered by Crocket J., it is stated that the collision that had occurred "was not a case of mere nonrepair or nonfeasance but of the actual creation of a hidden menace to navigation by a department of the government through its fully authorized officers and servants in the construction of a public work."

I quite agree that in these two cases the point now under discussion was apparently not raised acutely but those decisions may, I think, be justified on the ground I have suggested.

As to what Grossman did, I am content to adopt the reasons of my brother Taschereau but I might emphasize that while the trial judge had a view of the airport, conditions had changed since the day of the occurrence, and, in any event, he had only such evidence as was given before him as to what, on the day in question, was observable from the air. My brother Taschereau has also dealt with that aspect of the matter and I agree with what he has said.

I would allow Grossman's appeal and direct judgment to be entered in his favour for $7,003.90, the amount of his damages fixed by the trial judge. Grossman is entitled to his costs of the action and appeal. As the total amounts

(1) [1927] S.C.R. 68 at 77. (2) [1940] S.C.R. 153.

claimed by Sun is $440, this Court has no jurisdiction under the provisions of the Exchequer Court Act to hear his appeal which should be quashed without costs.

TASCHEREAU J.:—The suppliants in their petition allege that on the 19th of July, 1948, they took off from the airport at the city of Prince Albert, province of Saskatchewan, to fly to the city of Saskatoon, and that on arriving at the said airport, they ran into a ditch or excavation running across the used portion of the airport. As a result, Grossman's aircraft was demolished and Sun, the passenger, suffered bodily injuries.

Grossman claimed from His Majesty the King, in the rights of the Dominion of Canada, owner of the airport, the value of the plane, plus $785 for expenses, making a total of $7,705. Sun's claim amounted to $440 for personal injury. The Exchequer Court dismissed both claims with costs, hence the present appeal.

Grossman, who is a resident of DesMoines, Iowa, U.S.A., was the owner of the craft, a Stinson Station Wagon, registered under No. N.C. 893C, with the Civil Aeronautics Administration, and on the date of the mishap, was the holder of a pilot's license, since May, 1946. He was an experienced pilot, having flown previously approximately 450 hours. On this particular occasion, he had entered Canada from the United States at Winnipeg and had stopped at Lethbridge, Calgary, Bienfait, before leaving Prince Albert to go to Saskatoon. He left Prince Albert at about 2:30 p.m. when the flying conditions were good; the wind was blowing lightly from the southeast, and as he says in his evidence, the ceiling was "ideal".

He flew at a level of 3,000 feet above the ground, and of about 4,500 to 5,000 feet above sea level. He was in possession of a map previously obtained from a Canadian Airport at Melfort, called "The Saskatoon-Prince Albert-Saskatchewan-Area", which indicated that the Saskatoon airport was a *public airport*. At a distance of approximately 15 miles from Saskatoon, Grossman started to reduce his altitude to 2,500 feet, and as he reached the airport he flew at 1,500 feet. As the airplane was equipped with a two-way radio, he tuned into tower frequency 275 K.O.L. which is the universal control frequency, but as there was no

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tower control in operation at Saskatoon, he received no answer. He had no trouble in finding the airport even from a great distance, as the visibility was very good. He was aware that new runways had been built recently, and he states that he could see them very well from the air. One runs northwest, southeast, and the other approximately east-west. They extend for a distance of over 3,000 feet, and are hard surfaced strips capable of being used by the heaviest planes. To the east of these new strips are the old R.C.A.F. runways, north of which, in the northeast corner of the airport, is a grass landing strip running north-south, and a small building on the east, owned by the Canadian Pacific Air Lines. This grass air field is used by the Saskatoon Flying Club, the Saskatchewan Air Lines, and some other light planes which frequently land at that particular place. It is to be noticed that the boundary markings used on that grass landing ground were still there at the date of the accident.

When Grossman spotted the airport, he made what is called a "pass over the field." He looked at the windsock, and made a turn and planned to land on one of the new runways, but as he saw men at work, he regained altitude and continued his flight, proceeded east and then north, when he observed a building with the word "Airport" printed in large letters on the roof, and to the west of this building, that part of the grass surface of the airport used as runways. Continuing north, he then turned towards the west and then to the south, and made his landing well down on the north-south strip, and he testifies that he gave himself more than adequate space to complete his landing before arriving at the building, where he intended to bring his plane to a stop. The evidence reveals that he made a 3-point stall landing at 55 miles per hour, and was rolling along the grass runways, when he suddenly realized that there was an obstruction in front of him. He decided to attempt a take-off, but did not succeed in lifting his craft, and his under-carriage caught the south side of a ditch and his plane crashed into the ground.

This airport was originally operated by the Royal Canadian Air Force, but after the last war, was taken over by the Department of Transport, when it was decided to build the two new hard surfaced strips, which were in use

long before the date of the accident. It was then deemed necessary to provide for adequate drainage, and a sum of approximately one million dollars was expended. A large open ditch was dug about 2,000 feet in length, 48 feet wide, and varying in depth from 7 to 11 feet, *intersecting the old gras strip at right angles,* at 2,800 feet from the north limit of the airport, but, it was found too expensive to fill it. It is in evidence that those in charge, allowed grass and weeds to grow on both sides of the ditch, making it harder to detect its location from the air; approximately 17 to 18 flags were placed on each side of the ditch to indicate an actual danger, known to those in charge of the field, but which oncoming pilots could not easily ascertain, unless sufficiently informed.

The suppliants contend that the warning was insufficient, and with this submission I agree. Philip R. Nicholas, the airport maintenance foreman, admitted in his evidence that the danger resulting from the presence of the ditch was discussed and that complaints had been received with respect thereto. As to the flags which he placed in 1946, in order to warn oncoming planes, he is "not just too sure as to how distinguishable they were". He admitted, after comparing the exhibits, which were photographs of the ditch and of the flags, that the flags and posts present at the time of the trial, were considerably more numerous than those which existed in July, 1948, the month in which the accident happened. Many witnesses were called on behalf of the appellant and of the respondent as to the visibility of these flags and of the ditch from the air. Some say that they were hardly visible, that the ditch could be mistaken for a roadway; some others, that it is possible to detect it, flying at a height of 600 to 800 feet. As to the appellant Grossman, he is very emphatic in his evidence that he did not see the flags or the ditch.

It is undisputable that a *public airport,* as this one was, must offer a standard of security, at least equal to the one required by the regulations enacted by the competent authorities. (P.C. 2129). Air Regulations provide:

12. At every land aerodrome open to public use, the boundaries of the landing area shall, by means of suitable markings, be rendered clearly visible both to aircraft in the air and to aircraft manoeuvring on the landing area. In addition, a circle marking may be placed on the landing area. *All obstructions existing on a landing area shall be clearly marked.*

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In case part of the marked landing area should become unfit for use, this part shall be delimited by clearly visible markings or flags, and may, in addition *be* indicated by one or more clearly visible crosses.

Air Regulation 13 says:—

13. (*d*) (1) When special circumstances call for a prohibition to land liable to be prolonged, *use shall be made of a red square panel,* placed horizontally, each side of which measures at least 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;

(2) When the bad state of the landing area or any other reason calls for the observance of certain precautions in landing, *use may be made of a red square panel,* placed horizontally, each side of which measures at least 10 feet and one of the diagonals of which is covered by a yellow strip at least 20 inches in width;

These requirements were surely not fulfilled in the present case, and I have reached the conclusion, that the obstruction on the landing field was not sufficiently clearly indicated. These small flags were most probably visible from the ground, and could serve as a warning for a take-off, but it is common knowledge, and the preponderance of evidence so reveals, that from the air, placed as they were on perpendicular posts, their efficacy was practically nil. Leslie Deane, superintendent of maintenance and operations for the Saskatchewan Government Airways, flew the day after the accident to the Saskatoon Airport, and he testifies that he could not see the flags, nor detect the ditch. I quite agree that a pilot familiar with that airport, and consequently aware of the existence of this obstruction, could from the air realize the obviousness of the danger, but it was Grossman's first attempt to land on that field, which he could expect to find in a safe condition, unless otherwise properly and efficiently cautioned. Airfields must offer sufficient safety not merely to those who have knowledge of the actual danger they may present, but also to those who, unaware of an existing and insufficiently made known peril, use their facilities for the first time. In *Imperial Airways Limited* v. *National Flying Services,* which is an English case but reported in U.S. Aviation Reports, 1933, at page 50, an aircraft was damaged falling through the cover over a concealed stream running across the middle of an aerodrome. It was held by Lord Hewart that the proprietors of an aerodrome, are under obligation to see that the aerodrome is safe for use by such aircraft as

are entitled to use it, and that a *proper* warning of any danger of which they knew or ought to have known must be given.

It is said on behalf of the Crown that if Grossman had dragged the field or made what has been called a "dummy run", he would have seen the obstruction, and avoided the accident. After having unsuccessfully attempted to land on the hard surfaced strip, on account of men being at work, the appellant made a circuit to reach the grass landing field. If, as suggested, making a "dummy run" means flying at a low level, all across the field, to find possible obstructions, this would amount to a violation of Air Regulations 41 and 42 which read as follows:

> 41. If an aerodyne starting from or about to land on an aerodrome makes a circuit or partial circuit, *the turning must be made clear of the landing area and must be left-handed* (anti-clockwise), so that during such circuit the landing area shall always be on its left.
>
> 42. (*b*) Landings shall be preceded by a descent in a straight line, commenced at least 3,000 feet outside the perimeter of the landing area;

The appellant followed, I think, the recognized and proper method in landing. He made an anti-clockwise circuit of the field, and descended in a straight line towards what appeared to be a safe marked grass strip, made a successful landing and was rolling on the ground towards the hangars when the accident happened. What he did was in accordance with the regulations, and I cannot see that any negligence may be attributed to him. Mr. B. F. Burbridge, Inspector of the Department of Transport, Civil Aviation, who was called as a witness by the respondent, justifies in his evidence what Grossman has done when he attempted to land. He states that a pilot must not cross the airfield, but *must fly around the boundaries* of the airport. The only crossing allowed is to fly down the runway which is in use. He adds that it is not necessary for a pilot to make a "dummy run" over a particular runway if he has previously observed the field. This appears to be in complete harmony with the Air Regulations and the occurrences in the instant case.

It is also argued that appellant failed to obtain the necessary information as to the landing conditions of the field where he intended to land. Before leaving Prince Albert, he had with him an air navigation map supplied

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by the Department of Mines and Resources, indicating that the Saskatoon Airport was a *public airport,* which under the Air Regulations is a centre for air traffic, containing installations necessary for such traffic. He inquired as to the facilities of the airport, and from the information obtained it was reasonable for him to conclude that he would not later encounter the difficulties that he experienced with such unfortunate results. Upon approaching Saskatoon, while flying at a height of 2,500 feet, he attempted to contact the control tower but he received no answer. When there is a control tower, it is from there that the aerial traffic is governed, and all pilots are bound to comply with the instructions they receive from the operator. But when there is none, (and there are only 5 per cent of the used airports which are thus equipped) pilots must land after having taken the necessary precautions that ordinary prudent men would take under similar circumstances. There is no obligation sanctioned by law or by common practice to contact any other station called radio range or otherwise, which is not concerned with traffic, but mostly with weather conditions, particularly when there is no danger *reasonably foreseeable,* and nothing appears abnormal. It is by virtue of the regulations, the obligation of the airport itself to warn by *clearly marked signs* of any obstructions on the field, and not the duty of the pilot to inquire if any employee has been negligent, and if his life is in peril *by accepting the implied invitation to land.* (Vide International Civil Aviation Conference, 1944, sections 5 and 28). It would otherwise be tantamount to a total reversal of the respective duties and obligations imposed by law to the parties. Of course, it would be more efficient for the pilot to do so, but the law does not require such a high standard of care. Perfection in the actions or behaviour of men is not a condition *sine qua non,* to the right to claim damages. Motorists who drive on public highways, captains who bring their ships into port, are entitled to expect that the road will be in a safe condition, that there will not be any submerged object to obstruct navigation. *King* v. *Hochelaga Shipping* (1). Unless he knows of the danger, on account of its obviousness or otherwise, the driver of the automobile, or the captain of the

(1) [1940] S.C.R. 155.

ship is entitled to be warned of its existence. The right of a pilot of an aircraft, invited to land on a public airfield is identical.

The respondent further contends that even if Grossman was not negligent, the responsibility of the Crown cannot be involved. The basis of its liability could only be found in section 19(*c*) of the Exchequer Court Act, which is as follows:—

> 19. The Exchequer Court shall also have original jurisdiction to hear and determine the following matters:
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to the property resuting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

During a period of many years this Court has determined what is the liability of the Crown as a result of the negligence of its employees, in circumstances similar to those with which we are now dealing.

In *The King* v. *Canada Steamship Lines Limited* (1), it was held that an employee of the Crown in allowing continued use of a wharf at Tadoussac, and *in failing to give warning* to the Steamship Company of the dangerous condition of the premises, was guilty of negligence as an "officer or servant of the Crown while acting within the scope of his duties or employment", and that his neglect entailed the liability of the Crown for consequent injuries.

In *The King* v. *Hochelaga Shipping Company,* (cited *supra*) the employees of the Crown had left a submerged crib work near a government breakwater, that had broken away during a storm, with nothing to warn navigators of its presence. The Court decided that this obstruction constituted a dangerous menace to navigation, and that for not providing *the necessary warning,* the officials and servants of the Crown in charge of these works, were chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the *Exchequer Court Act.*

What this Court held in these two cases clearly indicates that the employees of the Crown failed in their duty to third parties, that their negligence, although arising only out of an omission to act, entailed *their personal liability,* and consequently the vicarious liability of the Crown. The

(1) [1927] S.C.R. 68.

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Court was not merely confronted with cases of nonfeasance of acts which should have been done by the servant, as the result of a contract between the employer and the employee, and which would not involve the personal liability of the latter to third persons, but with the failure to perform a duty owed to the victims. (Halsbury, Vol. 22, page 255).

The Crown strongly relies on the more recent decision of this Court in *The King* v. *Anthony* (1). In that case, two aspects of the vicarious liability were considered. It was held firstly, that the act of the soldier in shooting an incendiary bullet into a barn, which eventually burnt, could not be treated as an act of negligence committed while acting within the scope of his duties; it was a wilful act done for his own purpose, quite outside of the range of anything that might be called incidental to them. Secondly, it was said that the failure of the officer in charge of the group of soldiers, to prevent one of them from firing the shot, did not constitute a breach of private duty to the owner of the barn, and that the rule *Respondeat Superior* did not apply. His omission to exercise his authority was a breach of military law, for which he was accountable to his superiors, but his dereliction could not be considered as enuring to the private benefit of other persons. There were special circumstances which governed the *Anthony* case, which do not exist in the present instance. In the former, the personal liability of the officer in charge, an essential element to the application of the rule *Respondeat Superior,* was not shown to be present, but in the case at bar, we must, I think, necesarily be guided by the principles enunciated in *The King* v. *Canada Steamship Lines,* and *The King* v. *Hochelaga* (cited *supra*), which remained unaffected by what has been said in the *Anthony* case.

In these two cases, as in the present one, the negligence was the failure to warn of an existing danger that the employees of the Crown in the performance of their duty, knew or ought to have known, bringing into play section 19(*c*) of the Exchequer Court Act. I would indeed be loath to hold that an employee of the Crown, whose concern it is to maintain an airfield in proper and safe condition, and to indicate by visible marks all dangerous obstructions,

(1) [1946] S.C.R. 569.

would not if he failed to do so, be neglectful of his duty to oncoming pilots whose welcome on Canadian soil has been sanctioned and recognized by an international agreement with foreign countries. It is from him that diligence and alertness is rightly expected. His lack of vigilance is a personal negligence, for which the "Superior" is answerable before the courts. It follows that the Crown must be held liable for the damage caused to the plane and for other losses incurred by plaintiff Grossman, to the extent of $7,003.90, as assessed by the trial judge for the purpose of the present appeal, although he dismissed the petition. The other petitioner Sun, is exactly in the same position as Grossman, but unfortunately his claim must be refused, as the amount involved is not sufficient to give jurisdiction to this Court to hear his appeal, and grant the remedy to which he would otherwise be entitled.

I would therefore allow Grossman's appeal for $7,003.90 with costs throughout, and quash Sun's appeal without costs.

KELLOCK J.:—The airport here in question was at the relevant time owned and operated by the Crown. In what appears roughly to be its centre, two concrete strips had been built to accommodate very large aircraft. These strips run approximately north-west and south-east, and east and west respectively, intersecting at their northerly limits. Older concrete strips existed on the field prior to the making of the new strips. The new strips crossed the older ones at more than one point. There was also in the north-east corner of the airport area a grass landing strip running north and south, to the east of which and toward its northerly end there was a building owned by the Canadian Pacific Airlines, which had painted on its roof the word "Airport" clearly visible from the air. This grass landing strip was marked by some boundary markings which at the same time indicated to aircraft that the area further to the east and north was unfit for landing. The grass strip was used by the majority of the smaller and lighter types of planes. The plane of the appellant was of that type.

At the time the two new concrete strips were built in 1946, a large open ditch had been dug running south-easterly from the easterly end of the east-west strip for a distance of

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approximately 2,000 feet. This ditch was about 48 feet in width at the top and varied in depth from 7 to 11 feet. It cut through the grass strip at about right-angles at a point about 2,800 feet from the north limit of the airport, and about 1,300 feet from the south limit of the strip itself, where the hangars were situate. At the time of the accident, the raw wound originally made in the earth by the excavation had become covered by a growth of weeds, affecting its visibility considerably. The only marking of the ditch consisted in a number of posts about 10 feet high on which red flags had been placed. When originally placed, the posts were brightly painted, but at the time of the accident they had become quite dull and many of the original posts appear to have disappeared, the actual number in position at the time of the accident being quite uncertain. Some of the witnesses place this number as low as six. In the year following the accident, the posts were painted "international orange and white", and solid panels or frameworks capable of swinging a full circle were substituted for the flags.

The learned trial judge finds on the whole of the evidence that, at the time of the accident, pilots knowing of the existence of the ditch could readily locate its position, but that a pilot who did not know of its existence would have difficulty in seeing either the ditch or the flags unless he first flew over the field at a height of 1,000 feet or less.

The suppliant, before coming to the airport here in question, had, on entering Canada, landed at Stevenson airfield, Winnipeg, and had also made landings at Port Arthur, Melfort, Portage and Kenora. On an earlier trip he had also landed at Lethbridge, Calgary, Bienfait and Moose Jaw.

The day of the accident was bright and clear with a light, variable wind. At the time the appellant left Prince Albert the wind was south-easterly, and he testifies that that was still the direction as indicated by the air sock at the airport when he arrived at Saskatoon. There was evidence adduced by the respondent that its direction had changed to northerly, but the wind direction is not the subject of a finding.

The learned trial judge considered that the ditch in question constituted

"an obstruction on the runway of a public airport."

In his view, failure to give adequate warning thereof to those lawfully using the facilities of the airport and exercising reasonable care, would constitute negligence for which the Crown could be liable under the provisions of s. 19(*c*) of the *Exchequer Court Act*. He then considered the question as to the nature of the duty, if any, owed to the appellant in the circumstances, holding that as the airport was admittedly one open to public use, the appellant could not be considered a trespasser. He continues,

> There is no evidence as to whether any fees were charged to the owners of airplanes which landed on the airport, or whether such services as the supplying of gas and oil or storage were supplied by the respondent or by tenants on the property.

In these circumstances, he was unable to find that the appellant was

"invited into the premises by the owner or occupier for some purpose of business or of material interest,"

and therefore came to the conclusion that the appellant was to be considered a licensee.

The evidence which the learned trial judge thought was lacking is, however, present. Exhibit 2 is a publication of the Department of Mines and Resources produced by the respondent. On the argument before us it was contended for the respondent that no part of this document had been put in evidence except the diagram of the airport. The document, in addition to the diagram, contains a good deal of information as to the airport, and includes the following:

"GROUND FACILITIES

Hangars
Available

Fuel and Oil
Available"

All of this was placed in evidence by the respondent. I do not think, therefore, that the appellant can be treated as a mere licensee. He was an invitee. This renders inapplicable the view of the learned trial judge on the question as to the nature of the duty owed by the respondent to

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the appellant, namely, that the only duty on the part of the respondent was not to allow anything in the nature of a trap to exist.

The learned judge expressly finds, however, that it was well known to those in charge of the airport that that part of it north of the ditch, on which the appellant landed, was in daily use by a large number of light planes, and that it was the duty of the airport manager to mark any obstructions, the ditch being one.

Nicholas, who was in charge of the airport for the Crown testified that it was left to him to take all proper precautions with respect to the field and its markings. In 1946 he had placed the red cloth flags on the poles. These were the only markers or warnings placed at or near the ditch, and the fact that he did place them there indicates that he was alive to the danger constituted by the ditch.

Nicholas himself said that he had observed the ditch from the air after the flags had been put up, and deposed in this connection,

> Q. And did you particulary observe whether they could be seen from the air?
>
> A. I believe when they were first placed there I could see them from the air.
>
> Q. And later on you can't say?
>
> A. Later on I am not just too sure as to how distinguishable they were.

While the learned judge found that

> the existence of the old boundary markers there and of the building marked "Airport" would indicate to a pilot that there was there a small area available for landing,

he was of opinion that the

> proper practice to follow in approaching a strange landing area and where the facilities of the control tower or radio range are not used is that of "dragging the field," or making a "dummy run" over the landing strip at such an altitude as would give full information as to existing conditions thereon.

This view of the learned trial judge is, of course, predicated upon the limited nature of the duty owed to the appellant. The duty of an occupier, however, toward an invitee is to take reasonable care that the premises are safe; *Addie* v. *Dumbreck* (1), per Lord Hailsham at 365.

(1) [1929] A.C. 358.

It is established beyond peradventure that the strip upon which the appellant landed was part of the area upon which the public flying light airplanes were invited to land and did land constantly. It is admitted also that the ditch was an obstruction and was recognized as such. The attempt made to mark it for the danger that it was, was quite insufficient. It is contended on the part of the respondent that the international air regulations are not binding upon it. Accepting that point of view, the regulations are nevertheless evidence of what measures were recognized in order to protect against obstructions, including those of the nature here in question. Part V, Section 2, deals with ground markings, Article 12 of which provides that

> At every land aerodrome open to public use, the boundaries of the *landing area* shall, by means of suitable markings, be rendered clearly visible both to aircraft in the air and to aircraft manoeuvring on the landing area . . . *All* obstructions existing on a landing area shall be clearly marked. In case part of the marked landing area should become unfit for use, this part shall be delimited by *clearly visible* markings or flags, and may, in addition, be indicated by one or more clearly visible crosses.

Article 13(*d*) provides that

> (1) When special circumstances call for a prohibition to land liable to be prolonged, use *shall* be made of a red square panel, placed horizontally, each side of which measures *at least* 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;
>
> (2) When the bad state of the landing area or *any other reason* calls for the observance of certain precautions in landing, use may be made of a red square panel, placed horizontally, each side of which measures at least 10 feet and one of the diagonals of which is covered by a yellow strip at least 20 inches in width;

How far short of this standard the posts and flags placed by Nicholas and allowed to disintegrate, falls, needs no comment. After the accident, new posts were put in on each side of the ditch and painted "international" orange and white, which the evidence shows is a clearly visible colour, and then, instead of cloth flags, a full panel of plywood painted red was placed on the posts in accordance with Article 13(*d*) (2). It cannot be said, in my opinion, on the evidence, that had this standard of care been observed, the appellant would not have seen the markings.

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In connection with his finding that it was the duty of the appellant to have made a "dummy" run over the landing area in which he landed before actually landing, the learned judge relies substantially on the evidence of the witness Burbridge, Inspector of Civil Aviation, Department of Transport. When giving evidence in chief on behalf of the Crown, this witness had said:

Q. In your opinion what procedure should a pilot follow when landing on an unfamiliar airport?

A. He should first of all land on a serviceable runway. If he is not familiar with that particular airport, if he never landed there before, if he is not in touch with flying *surely* he should make a dummy run on the landing strip on which he chooses to land.

It is plain to my mind that the witness, in his use of the word "surely," is arguing rather than giving evidence as to an accepted standard of care. That that is so appears very clearly from his subsequent evidence. He continues:

Q. What do you mean by a dummy run?

A. To run over the area of the ground he intends to land on, at a low altitude.

Q. At what altitude?

A. Any safe altitude.

HIS LORDSHIP: What do you mean by that? Low enough to give him—?

A. Accurate vision.

Q. Observation of the strip?

A. Yes.

He is then referred to the experience which the appellant had in discovering Nicholas and his workmen putting asphalt on the large concrete strip on which he had proposed to land, and he gave the following evidence as to what he would have done:

Q. What do you say you would have done if confronted with the same situation?

A. Coming in I would have carried out a dummy run of the landing strip that was into the wind, finding out those vehicles and workmen on that strip I would have carried out another circuit over the same area at a low altitude. After a while on the next dummy run, if the workmen and vehicles were still on the runway I would have carried out a second dummy run, and a third dummy run, and if they were still there if in any hurry to get out I would have used the other runway, the grass one.

In cross-examination, however, he explains the above.

Q. Coming down to conditions in Saskatoon, assuming you were coming in on the hard surface runway and you saw some men there, tell us what you think the pilot should have done.

A. I have done that.

Q. And you think he should have waved or signalled to the men?

A. Yes.

Q. Now, is it true that one or two courses would be open to him: either to signal to the men, or choose an alternative landing ground?

A. That is right.

* * *

Q. Supposing there were two strips, both in the same direction and the pilot saw one strip he could land on, would it be ordinary practice for him under those circumstances not to make a dummy run, but simply just use the other runway?

A. Provided he had surveyed the other strip.

With respect to the height at which this survey should be made, he had suggested, in chief, 100 feet from the ground. In cross-examination he gave the following evidence:

Q. At what height should the dummy run be made?

A. It is up to the capabilities of the pilot and the aircraft he is flying. Each pilot has his own capabilities.

Q. Let us put it this way. In light aircraft, at what height would you say the dummy run should be made?

A. With skill a pilot can carry out a dummy run at one hundred feet, provided there was no obstruction.

Q. But a slightly less experienced pilot, he could do that higher, is that it?

A. Yes.

Q. Would you say that he could fly at six hundred feet or eight hundred feet?

A. It is up to the individual pilot.

Q. It is entirely up to the individual pilot?

A. Yes.

* * *

Q. I think the regulations require a pilot to cross the airfield, do they not?

A. No.

Q. But it is a customary practice to cross an airfield?

A. To cross an airfield?

Q. To fly across an airfield?

A. Provided he carries out a circuit, that is to say, he flies around the boundaries of the airport.

Q. Is it customary to fly across an airfield and then make a circuit to land?

A. Provided you are flying down the live runway which is in use.

Q. What I am getting at is this: If a pilot sees a runway down on an airfield when he is making the circuit and there is no obstruction on it, would it be necessary for him to make a dummy run over that particular runway?

A. No, provided he had surveyed from one end of the runway to the other, so he could observe the runway from one end to the other.

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Q. Would you make a dummy run at one hundred feet over these hard surface runways?

A. Not exactly one hundred. I would use my own discretion. You can sometimes see an airport ten miles out and would more or less figure in the air, within two miles you can more or less survey the runway. It depends on the visibility.

Q. You can see it from quite a distance?

A. Yes, according to the visibility.

Q. Would you say it is common for people to make a dummy run at a very low altitude over airports?

A. No, it is not common. The only time you would really get down low would be with bad visibility.

Q. If it is good visibility you would not get down low?

A. No, definitely. It is bad practice. You survey the runway from the altitude you think you can observe all obstructions on the ground.

This evidence speaks for itself. There is other evidence to the same effect.

Neal, flying instructor of the Des Moines Flying Service, deposed:

Q. Do you know what the expression "dragging the field" means?

A. Yes.

Q. What does it mean?

A. That means to come down to a low altitude to observe the condition of the field as to landing. It is not a common practice at a controlled airport or municipal airport.

* * *

Q. Now, can you tell me, as an experienced pilot, when you drag a field, or drag an area?

A. That, sir, comes in landing at any other field, other than an airport, where you don't know the condition previously.

Q. What would you say as to the practice of dragging an airport from the safety factor?

A. Dragging an airport from the safety factor would depend greatly on the amount of traffic going on around it. If there is not other traffic maybe it is safe, if there is, it is entirely unsafe.

With respect to the use of his radio, the appellant made the recognized call on the proper frequency as he approached the airfield, but there was no "tower" on that field and he got no reply. There was a "radio range" in operation at the field on a different frequency, and the witness Young, called by the Crown, who was in charge, said that if such a call had been made it would have been intercepted and answered by radio range, and the pilot given all information about the field. The same witness admits, however, that at the time when the appellant arrived at the field, he himself was working on the ground.

He had an assistant who was supposed to be at the instrument, but Young admitted that this man might have been absent at the time. The assistant himself was not called. I see nothing, therefore, in this evidence to contradict the evidence of the appellant, or indicating any lack of care on his part in this respect.

The appellant approached the field at a height of 2,500 feet and crossed the boundary at 1,500 feet. The visibility was good. He saw the new concrete runways and observed the wind sock which indicated that the wind was still south-easterly. He turned to the north, decreased his elevation to 600 feet, turned again to the south-east and descended to 200 feet, when he had to abandon his intention to land owing to the presence of the workmen on the strip. He climbed back to 600 feet and turned left, presumably after crossing the south limit of the field, turned north and went up along the east boundary. He saw the building marked "Airport" and "to the west of this building a grass landing strip marked available by conventional signs, wooden markers at the ends and at the cross points of the runways dissecting the landing strips." He made another left turn and then landed. As already pointed out, there was nothing in the way of adequate or recognized marking to indicate the presence of the ditch.

In my opinion, it is clear that Nicholas, who was left in charge of the field to place whatever markings on it good practice called for, failed in his duty to a person such as the appellant, and that this breach of duty was negligence for which the Crown is responsible under s. 19(*c*) of the statute.

In *Dubois* v. *The King* (1), Sir Lyman Duff said:

> My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and any injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute; that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work." I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, working of public works.

(1) [1935] S.C.R. 378.

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Illustrations of the application of this principle in particular instances are to be found in *Hochelaga* v. *The King* (1), and *Canada Steamships* v. *The King* (2). Merely because the neglect which produces an injury is neglect of a duty owing to a master does not preclude its being also neglect of a duty owing to a third person. Surely the brakeman, whose duty it is in the course of his employment to throw a switch when he sees an on-coming train, would be liable to passengers on the train injured by his failure to do so. As stated in Halsbury, 2nd Ed., Vol. 23, p. 588, the distinction between nonfeasance and misfeasance has no application to the question of liability when the duty properly to do a particular act omitted or improperly performed has been established. It is well settled that negligence consists in a legal duty to exercise care and a failure in the exercise of the care necessary in the circumstances of any particular case. In my opinion, Nicholas owed a duty to persons in the position of the appellant who were entitled to rely on the proper discharge of that duty in the marking of the dangerous ditch; *Howard* v. *The King* (3).

I would allow the appeal with costs here and below, and direct judgment in favour of the appellant Grossman in the amount found by the learned trial judge, namely, $7,003.90.

The appeal of Sun should be quashed without costs.

ESTEY J.:—This is an appeal from a judgment of the Exchequer Court (4) dismissing the appellants' action for damages arising out of injuries suffered in the course of landing an aeroplane, piloted by the appellant Grossman, at the Saskatoon airport on July 19, 1948.

The airport at Saskatoon is owned by His Majesty in the right of the Dominion and operated through the Department of Transport. It is a public airport, within the meaning of the Air Regulations contained in P.C. 2129, dated the 11th day of May, 1948, and passed under the authority of the *Aeronautics Act* (R.S.C. 1927, c. 3). In 1946 contractors completed two large cement runways and, for purposes of drainage, an open ditch upon which Grossman's aeroplane was wrecked.

(1) [1940] S.C.R. 153.
(2) [1927] S.C.R. 68.
(3) [1924] Ex. C.R. 143.
(4) [1950] Ex. C.R. 469; [1951] 1 D.L.R. 168.

The appellant Grossman is an experienced pilot, licensed by the Civil Aeronautics Administration of the United States Department of Commerce. He owned a 1948 model Stinson Station Wagon in which he had flown into Canada, where he had landed at a few airports, and was at Prince Albert on July 19, 1948, when he and the appellant Sun left for the city of Saskatoon. Grossman had never seen the airport at Saskatoon, but had obtained a map of the Saskatoon-Prince Albert area, upon which it was noted that Saskatoon had a "public airport with beacon." In conversation with some men at the Prince Albert airport Grossman was told that at Saskatoon "there was a good airport" with "two new runways." He left Prince Albert with the intention of landing upon one of these new runways.

Grossman describes July 19, 1948, as "a beautiful day" upon which, at about 2:30 in the afternoon, he left Prince Albert. Approximately 15 miles from Saskatoon he commenced to reduce his altitude from about 3,000 to 2,500 feet above ground and, as he came to the airport, he came down to 1,500 feet. Visibility was good and he had no difficulty in locating the airport at Saskatoon.

His only effort, through his two-way radio, to communicate with those in charge at the airport failed. He, however, proceeded to effect a landing upon one of the two cement runways, but, in coming down, he observed men working thereon. He thereupon regained altitude to 600 feet and, after making "a left turn to the east, another turn north, along that east boundary of the field", he came down on the grass landing strip and, while taxiing toward the hangars, he observed, but too late, the ditch here in question and there damaged his aeroplane.

This grass area was regularly used by lighter aeroplanes, such as Grossman's, and it is not suggested that Grossman had not a right to land thereon. It is contended that had he used due care in his attempt to land he would have seen the ditch, or the warning flags, and avoided the injuries suffered.

This grass area runs from the north fence southward to near the hangars, a distance of approximately 4,000 feet. Grossman says that, though he observed the length of this distance, he saw neither the ditch nor the flags and,

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having regard to the position of the hangars, he landed farther south of the fence than the evidence discloses all others landed. He explained that he did so because he would not have so far to taxi. As a consequence, before coming to a stop, he came upon the ditch, where he suffered the damage here claimed.

This ditch was constructed as, and was intended to remain, an open ditch. It is 2,000 feet long, 48 feet wide at the top, 7 to 11 feet in depth, and crosses the grass area about 2,800 feet south of the north fence and some 1,300 feet north of the hangars.

The construction of the open ditch across the grass runway constituted not only an obstruction within the meaning of the Air Regulations, but "special circumstances" which called "for a prohibition to land liable to be prolonged" and, therefore, should have been marked by "a red square panel, placed horizontally, each side of which measures at least 10 feet and the diagonals of which are covered by yellow strips at least 20 inches in width, arranged in the form of an X;" (The Air Regulations, Part V, para. 13(*d*) (1)).

Nicholas, the airport maintenance foreman or airport manager, was and had been in charge of this airport since 1945. He occupied that position when this open ditch was constructed and recognized it as an obstruction upon the landing area. As a consequence, he caused flags to be placed upon both sides of this ditch. They were red woollen flags, approximately 24 by 36 inches, and upon wooden poles 10 to 12 feet in height, placed on both sides about 100 feet apart, but so staggered that along the ditch a flag appeared at every 50 feet. This he did to warn aeroplanes approaching the airport and vehicular traffic working thereon. It is not, however, contended that these flags, so placed, constituted a compliance with the foregoing provision, nor, indeed, would they have been sufficient to clearly mark this obstruction within the general provision of Part V, para. 12, of the Air Regulations.

Grossman's failure to persist in his effort to communicate with those in charge of the airport and his failure to make a dummy run, both of which may be desirable and even necessary in certain circumstances, were not such upon this occasion. It was a clear day, with visibility good, and

if this ditch was not apparent there was nothing to suggest any difficulty in the making of a landing. Grossman did not see the flags, as placed, but, had warnings, in compliance with the Air Regulations, surrounded this ditch, there is every reason to conclude that he, making his observations at an altitude of 600 feet, would have seen them. These provisions in the Air Regulations should be regarded as the minimum requirement necessary to provide reasonable warning to pilots as they fly over or across the airport with the intent of effecting a landing. The flags here placed as a warning constituted but a negligent attempt to comply with the regulations and was the direct cause of the damage here claimed.

It is, however, contended on behalf of the Crown that, though the negligence of its agents and servants in not providing adequate warnings was the direct cause, the Crown is not liable for the damage suffered by Grossman, notwithstanding the provisions of s. 19(*c*) of the Exchequer Court Act:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> * * *
>
> (*c*) Every claim against the Crown arising out of any death or injury to the person or to the property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employement;

This provision, in its original form enacted in 1887, effected a change in the common law under which the Crown was not liable for the damage caused by the tortious acts of its agents and servants. After the amendment of 1917, Chief Justice Duff, in *The King* v. *Dubois* (1) at 397, interpreted this section, and the subsequent amendment of 1938 does not affect the relevancy of his statement:

> My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute; that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work." I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, working of public works.

(1) [1935] S.C.R. 378.

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The purpose of this public airport is to provide for the reception and despatch of aeroplanes—not only those operated by the citizens of Canada, but, having regard to the international agreements and conventions to which Canada is a party, also those operated by citizens of other countries. In these circumstances, the maintenance foreman or manager of this airport owed a duty, not only to the Crown, but to those who, as Grossman, properly utilized this airport. This distinguishes the case at bar from *The King* v. *Anthony* (1). Unlike the soldier who fired the bullet in that case, the maintenance foreman at this airport was acting within the scope of his employment. Then, unlike the superior officers in the *Anthony* case, of whom it was said their duties, as fixed by the military law relative to the supervision of their subordinates, were "not intended to enure to the private benefit of the citizen" and that such "an officer is not within the rule of *respondeat superior* for the act of one within his command," the maintenance foreman, in supervising the placing of these flags, was acting within the scope of his employment and performing a duty that, having regard to the permission granted to the public, was intended "to enure" to the benefit of those properly using the airport.

The contention that under s. 19(*c*) of the Exchequer Court Act the Crown is not liable for nonfeasance on the part of its agents and servants does not arise in this case. The conduct of the maintenance foreman or manager constituted a misfeasance, as that term has been understood and interpreted in this Court. Not only did he supervise the placing of these flags in the first place, but, as he stated, "they were replaced which was done from time to time, to our best judgment." He was maintaining and replacing them, which he negligently believed constituted a sufficient warning, in the course of the performance of his duties at this airport and, as he did so, was "acting within the scope of his duties or employment", within the meaning of s. 19(*c*) of the Exchequer Court Act.

It is often difficult to determine whether non-action is properly described as nonfeasance or, more appropriately, as an omission in the course of the discharge or execution of a duty or undertaking and, therefore, an improper performance, rather than a mere non-performance. In this

(1) [1946] S.C.R. 569.

case the maintenance foreman has negligently performed his duty to provide adequate warnings within the meaning of the regulations covering this ditch.

In *The King* v. *Hochelaga Shipping & Towing Co. Ltd.* (1), before a jetty was completed about 50 feet of the upper portion of the outward end broke away during a heavy storm, leaving the lower portion in position, but entirely submerged. The suppliant's towboat struck this submerged portion and the consequent damages were awarded against the Crown. Mr. Justice Crocket, writing the judgment of the majority of the Court, stated, at p. 163 that the collision

was attributable to such negligence on the part of officers and servants of the Crown, while acting within the scope of their duties or employment upon a public work as rendered the Crown responsible therefor under the provisions of s. 19(*c*) of the Exchequer Court Act. It was not a case of mere non-repair or nonfeasance, but of the actual creation of a hidden menace to navigation by a Department of the Government through its fully authorized officers and servants in the construction of a public work.

Chief Justice Duff, at p. 155:

* * * that the submerged cribwork which, after the superstructure of the jetty had been carried away, was left with nothing to warn navigators of its presence, constituted a dangerous menace to navigation; and that in leaving this obstruction without providing any such warning the officials concerned are chargeable with negligence for which the Crown is responsible by force of section 19(*c*) of the Exchequer Court Act.

Mr. Justice Davis, at p. 169:

While in one sense the acts complained of might be regarded as an omission, in substance the result of the acts of those in charge of the work of restoration of the jetty constituted misfeasance.

The maintenance foreman regarded this ditch as an obstruction and negligently performed his duty to place markings thereon, within the meaning of the Air Regulations, and thereby permitted this obstruction to remain without any adequate warning of its presence to those using the airport. It was a negligent performance of work undertaken by an agent or servant of the Crown and, as such, constituted misfeasance.

Though in *The King* v. *Canada Steamship Lines, Limited* (2), misfeasance and nonfeasance are not discussed, it is, however, significant to note that Chief Justice Anglin, writing the judgment of the Court, stated:

In taking the risk of allowing the continued use of the wharf pending such report and in failing to give any warning to the officers of the steamship company Brunet was in my opinion guilty of a dereliction of duty

(1) [1940] S.C.R. 153. (2) [1927] S.C.R. 68.

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amounting to negligence on his part as an "officer or servant of the Crown while acting within the scope of his duties or employment upon a public work". (*The King* v. *Schrobounst*) (1), and his neglect entailed liability of the Crown for the consequent injuries in person and property sustained by the passengers in attempting to land on the slip on the 7th of July.

Grossman's appeal should be allowed and judgment directed for $7,003.90, with costs throughout. This Court has no jurisdiction to entertain the appeal of the appellant Sun, his claim being for $440 only. It should, therefore, be quashed, but without costs.

CARTWRIGHT J.:—I agree with the reasons and conclusion of my brother Kerwin, subject to one reservation.

I do not think it necessary to decide in this appeal whether we are bound by the judgment of the majority in *The King* v. *Anthony* (2), to hold that in order to create a liability of the Crown under section 19(*c*) of the Exchequer Court Act it must invariably appear that some servant of the Crown has drawn upon himself a personal liability to the suppliant. I wish to reserve that question for future consideration if and when it may become necessary to determine it. It may then appear that this proposition of law was stated in wider terms than were necessary to the actual decision. It must be remembered that the alleged breach of duty complained of in *Anthony's* case was the failure of a non-commisioned officer in the military forces to give certain orders to men under his command in the course of manoeuvres being carried out in time of actual war, although not in the face of the enemy. It may well be that under such circumstances the tests of liability differ from those applicable to cases in which the Crown is engaged in carrying on an activity which, if operated by an individual, would be an ordinary commercial undertaking.

I would dispose of the appeals as proposed by my brother Kerwin.

Appeal of appellant Grossman, allowed with costs here and below. Appeal of appellant Sun quashed without costs, the Chief Justice and Locke J. dissenting.

Solicitors for the appellants: *Diefenbaker, Cuelenaere & Hall.*

Solicitor for the respondent: *F. P. Varcoe.*

(1) [1925] S.C.R. 458. (2) [1946] S.C.R. 569.

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called as a witness on his behalf, gave an explanation as to how the goods came into her husband's possession. The trial judge, sitting without a jury, found that the explanation was not a reasonable one but acquitted the accused on the receiving charge and convicted him on the charge of retaining. An appeal to the Ontario Court of Appeal was dismissed but leave to appeal to this Court was granted on the following questions of law: *(a)* The doctrine of recent possession does not apply to a charge of retaining stolen goods; *(b)* The learned trial judge having acquitted the accused on a charge of receiving could not in the circumstances of the case convict him on a charge of retaining; *(c)* An accused person cannot be convicted of both of the offences of receiving and retaining. *Held:* Rinfret C.J., Rand, Kellock, Estey, Locke and Cartwright JJ., (Kerwin, Taschereau and Fauteux JJ. dissenting): 1. the appeal should be allowed. 2. An accused person cannot be convicted both of receiving and of retaining. *R.* v. *Yeaman* 42 Can. C.C. 78; *R.* v. *Searle* 51 Can. C.C. 128; *Frozocas* v. *The King* 60 Can. C.C. 324; *Ecrement* v. *The King* 84 Can. C.C. 349. 3. The accused having been acquitted on a charge of receiving could not in the circumstances of the case be convicted of retaining. *Per* Rand, Kellock, Locke and Cartwright JJ. The accused having been acquitted on the receiving charge it was for the Crown to establish subsequent guilty knowledge which it failed to do. There was accordingly no evidence or no sufficient evidence upon which a charge of retaining could be supported. *Per* Kerwin J. *contra.* The rejection of the explanation permits the doctrine of recent possession to apply to the charge of retaining. Not only was there evidence to determine that the explanation was not reasonable but it appeared that was the only proper conclusion. *Per* Taschereau and Fauteux JJ. *contra.* In acquitting the accused on the charge of receiving the trial judge said he did not accept the explanation and therefore the presumption was not rebutted and it was open to him to decide as he did. *Held:* also, Rinfret C.J. Kerwin, Taschereau, Estey and Fauteux JJ., (Rand Kellock, Locke and Cartwright JJ. dissenting). The doctrine of recent possession applies to a charge of retaining. *The King* v. *Lum Man Bow*, 16 Can. C.C. 274; *Lopatinsky* v. *The King* [1948] S.C.R. 220. *Per* Taschereau and Fauteux JJ. S. 399 provides for two distinct offences "receiving" or "retaining" *knowing* it to have been so obtained. It matters not then *since when* on a charge of retaining, or *how long after* on a charge of receiving the guilty knowledge co-exists with possession, provided it does at any time during retention on the former, and at the time of reception on the latter. To import into the section any question as to the duration of the guilty knowledge is to add to the word "knowing" the most

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essential word in the entire section, a qualification expressly rejected from the provision by the very word itself. *Per* Estey J. The language adopted by Parliament indicates it contemplated the application of the doctrine to the offence of retaining, and this view finds support in that Parliament has not since *Lum Man Bow supra* was decided in 1910, enacted any amendment to the section. *Per* Rand, Kellock, Locke and Cartwright JJ. *contra.* The doctrine does not apply, the Crown must establish not only possession but knowledge subsequently acquired of the stolen character of the goods. *R.* v. *Cohen* 8 Cox C.C. 41 and *R.* v. *Sleep* 1 Le. & Ca. 44, applied. *The King* v. *Lum Man Bow, supra, Richler* v. *The King* [1939] S.C.R. 101 and *Lopatinsky* v. *The King, supra,* distinguished. CLAY v. THE KING.... **170**

3.——*Criminal Law — Evidence — Sale of drugs—Denied by accused—Proof of identification—Duty of Crown as to calling witnesses —Whether notice of appeal must be signed by Attorney General—Power of Court of Appeal to reverse acquittal and enter conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49—Criminal Code, ss. 1013(4), 1014, 1023(2).* The appellant was charged with having unlawfully sold a drug. The evidence for the prosecution was that Bunyk, an officer of the R.C.M.P., saw the accused, who was already known to him, sitting at a table in a restaurant. Bunyk, who was at the time accompanied by an informer, one Powell, could not say whether Powell saw the accused or not. Bunyk entered the restaurant alone and sat down beside the accused at whose table one Lowes was also sitting, and thereupon purchased the drug from the accused. Neither Powell nor Lowes was called as a witness. The accused denied that he was the man from whom the purchase was made and testified that he was not present, he also denied any knowledge of any person named Lowes. The proceedings were by way of speedy trial and the trial judge, although stating that he disbelieved the accused, acquitted him because of the failure of the prosecution to call Lowes or account for his absence. The appeal taken by the Crown was allowed and a conviction entered. *Held:* The appeal should be dismissed (Cartwright J., dissenting in part, would have ordered a new trial). *Held:* that counsel acting for the prosecution has full discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor has been influenced by some oblique motive (of which there is here no suggestion). This is not to be regarded as lessening the duty of the prosecutor to bring forward evidence of every material fact known to the prosecution whether favourable to the accused or otherwise. The appeal should be dismissed

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since there was no obligation on the Crown to call either Powell or Lowes at the trial. *(Adel Muhammed El Dabbah* v. *A.G. for Palestine* [1944] A.C. 156 applied; *Rex* v. *Seneviratne* [1936] 3 All E.R. 36 explained. *(Rex* v. *Lemay* (100 Can. C.C. 367), a decision of the Court of Appeal for British Columbia in an appeal by the same accused from his previous conviction on the same charge and ordering a new trial overruled). *Per* Locke J.: Since the *Criminal Code* is silent, the Criminal Law of England as it existed on the 19th day of November, 1858, governs the matter. If what appears to have been considered as a rule of practice prior to 1858 had become part of the common law of England, the principle applicable was as stated in *R.* v. *Woodhead* (1847) 2 C. & K. 520, and *R.* v. *Cassidy* (1858) 1 F. & F. 79, and the Crown was under no obligation to call either Powell or Lowes as a witness. *(R.* v. *Sing* (1932) 50 B.C.R. 32 and *R.* v. *Hop Lee* (1941) 56 B.C.R. 151 referred to. *Held also,* that since it is not expressed either explicitly or inferentially in s. 1013(4) of the *Criminal Code* that the Attorney General should personally sign the notice of appeal to the Court of Appeal, there is no substance to the objection that the notice was signed by B. as agent for the Attorney General of British Columbia. (Locke J. agreed with Robertson J.A. that the signature by the agent was sufficient since the appeal was substantially and actually in the name of, and for, the Attorney General of British Columbia). *Held* further, following *Beleyea* v. *The King* [1932] S.C.R. 279, that the Court of Appeal had the power to enter a conviction, it appearing that not only did the trial judge not accept or believe the accused's testimony but he believed and accepted the evidence of the R.C.M.P. officer, and that he dismissed the charge only because he considered wrongly that the Crown had to call Lowes or account for his absence. (Cartwright J., dissenting in part, would have ordered a new trial on the ground that it did not appear certain but only probable that the trial judge would have convicted but for his erroneous ruling on the point of law). LEMAY v. THE KING..... 232

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5.—— *Criminal law — Evidence — Conspiracy to sell, etc., narcotic drugs—Certificate of analysts only evidence of narcotics—Whether certificates admissible—No objection by defence—Testimony of analysts heard before Court of Appeal—Whether Court has*

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that power and whether it could then affirm conviction—Opium and Narcotic Drug Act, 1929, S. of C. 1929, c. 49, s. 18—Criminal Code, ss. 1014, 1021. The appellants were found by a jury to be guilty on three charges laid under s. 573 of the *Criminal Code* of conspiracy to possess, to sell and to transmit narcotic drugs in violation of the *Opium and Narcotic Drug Act, 1929,* (S. of C. 1929, c. 49). The only proof tendered at the trial that the substance was a narcotic drug, consisted of certificates of two analysts. The analysts were not heard as witnesses, although one of them was offered for cross-examination. Counsel for the accused did not at any time object to the admission of the certificates nor to the trial judge's reference to them in his charge as being "conclusive evidence" of the substance of the narcotic drug. On appeal, the accused contended that this evidence, although admissible under s. 18 of the *Opium and Narcotic Drug Act, 1929,* on a charge under that Act, was not admissible where the charge was one of conspiracy under the *Code.* Thereupon, the Crown asked for, and obtained, leave under s. 1021 of the *Code* to call the analysts at the hearing of the appeal; their testimony was heard in the absence of the accused, who declined to attend but who were represented by counsel who cross-examined the witnesses on behalf of the accused. The Court of Appeal for Manitoba affirmed the convictions. By leave granted by this Court, the accused appealed on two questions of law: *(a)* whether the Court of Appeal was empowered under ss. 1014 and 1021(1) *(b)* of the *Criminal Code* to allow the Crown to produce before that Court the oral evidence given by the analysts, and *(b)* whether the Court of Appeal was empowered on such evidence, taken in conjunction with that given at the trial, to affirm the convictions. *Held:* The appeals should be dismissed and the convictions affirmed since the Court of Appeal was justified in allowing the taking of further evidence and in affirming the convictions (Kerwin J., dissenting in part, would have ordered a new trial). *Per* Kerwin, Estey and Locke JJ.: The certificates were not admissible in evidence *(Desrochers* v. *The King,* 69 C.C.C. 322, overruled). (Taschereau J. expressing no opinion on that question, and Fauteux J. *contra*). *Per* Taschereau, Estey and Locke JJ.: In the circumstances of this case, having considered that it was necessary or expedient in the interests of justice to admit further evidence on a non-controversial issue, the Court of Appeal did not infringe any principle of law governing the exercise of the power to hear further evidence given to it by s. 1021(1) *(b)* of the *Code,* whose provisions are available to a respondent as well as to an appellant. Since there is no restriction as to the effect to be given by the Court of Appeal to the further evidence in disposing of the appeal under

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and to erect a passenger depot within the city on or before February 1, and November 1, 1883, respectively, and to deliver to the city a bond obligating it with all reasonable despatch to build within the limits of the city its principal workshops for the main line of its railway within the Province and the branches thereof radiating from Winnipeg and to forever continue the same within the city, and to erect within the city cattle yards suitable for its main line and the said branches. The city undertook in return to convey the lands upon which the depot was to be built and to issue to the company debentures for the sum of $200,000. The agreement further provided that upon the fulfilment by the C.P.R. of the conditions stipulated in the by-law, all property then owned or that might thereafter be owned by the company "within the limits of the City of Winnipeg for railway purposes, or in connection therewith shall be forever free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind." The obligations assumed by both parties were fulfilled and no question arose until 1948 when the City assessed all the lands and buildings, including a hotel and restaurant, owned by the company, for realty and business taxes. In this action brought to restrain the assessment, four main questions arose: (1) Is the said agreement valid and binding? If valid—(2) Is the exemption operative only within the limits of the city as these existed at the time the agreement was made or as those limits may have been from time to time constituted? (3) Is the exemption applicable to the hotel and restaurant? (4) Does the exemption include business tax? All questions were decided by the trial judge in favour of the company. On appeal, his decision on question one was affirmed, but reversed on the others. *Held:* The appeal of the C.P.R. should be allowed, the appeal of the City of Winnipeg dismissed, and the trial judgment restored. Rand and Kellock JJ. would have varied the judgment so as to exclude the hotel and restaurant from the exemption. *Per:* Rinfret C.J., Kerwin, Taschereau, Locke and Fauteux JJ.—It was unnecessary to determine whether the company was a common law corporation; by virtue of 1881 (Can.) c. 1 and s. 4 of the Letters Patent, the company had the power to enter into the agreement. *Per:* Rand and Kellock JJ.—The powers of the company were not those of a common law corporation. Assuming that the company could not bind itself to maintain the works in the city forever, but considering that (1) the company might in fact maintain them indefinitely, (2) the city, having up to the present time, received the entire current consideration for which it had bargained, (3) recission having been virtually impossible from the completion of the works, and (4) for any failure in the future, security by way of recoupment